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BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
IN AND FOR THE STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR  
AGENCY ACTION OF UTAH CHAPTER OF  
THE SIERRA CLUB, SOUTHERN UTAH  
WILDERNESS ALLIANCE, NATURAL RESOURCES  
DEFENSE COUNCIL, AND NATIONAL PARKS  
CONSERVATION ASSOCIATION, PETITIONERS;  
DIVISION OF OIL, GAS AND MINING,  
RESPONDENT REQUEST FOR BOARD REVIEW  
OF THE DIVISION'S OCTOBER 19, 2009,  
APPROVAL OF THE APPLICATION OF ALTON COAL  
DEVELOPMENT, LLC, TO CONDUCT SURFACE COAL  
MINING AND RECLAMATION OPERATIONS IN COAL  
HOLLOW, KANE COUNTY, UTAH.

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DOCKET NO. 2009-019 CAUSE NO. C/025/0005

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TAKEN AT: Department of Natural Resources  
1594 West North Temple, Room 1040  
Salt Lake City, Utah

DATE: Wednesday, January 27, 2010

TIME: 10:20 A.M. TO 3:13 P.M.

REPORTED BY: Michelle Mallonee, RPR

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## APPEARANCES

## BOARD OF OIL, GAS AND MINING:

Douglas E. Johnson, Chairman  
Ruland J. Gill, Jr.  
Jake Y. Harouny  
James T. Jensen  
Kelly L. Payne  
Samuel C. Quigley  
Jean Semborski

## DIVISION OF OIL, GAS AND MINING:

John R. Baza, Director  
Dana Dean, Associate Director, Mining  
Gil Hunt, Associate Director, Oil and Gas  
Steve Schneider, Administrative Policy Coordinator  
Julie Ann Carter, Secretary to the Board

## ASSISTANT ATTORNEYS GENERAL:

Steven F. Alder - Division Attorney  
Fred Donaldson - Division Attorney  
Michael S. Johnson - Board Attorney  
Stephen Schwendiman - Board Attorney  
Megan Depaulis - Board Attorney

[3]

1 FOR ALTON COAL DEVELOPMENT, LLP:  
2 JAMES P. ALLEN, ESQ.  
3 SNELL & WILMER, LLP

4 15 West South Temple Street  
5 Suite 1200

6 Salt Lake City, Utah 84101  
7 BENNETT E. BAYER, ESQ. (pro hac vice)  
8 LANDRUM & SHOUSE, LLP

9 106 West Vine Street  
10 Suite 800  
11 Lexington, Kentucky 40507

12 FOR THE PETITIONERS:

13 STEVE BLOCH, ESQ.  
14 TIFFANY BARTZ, ESQ.  
15 SOUTHERN UTAH WILDERNESS ALLIANCE  
16 425 East 100 South  
17 Salt Lake City, Utah 84111

18 WALTON D. MORRIS, JR.  
19 MORRIS LAW OFFICE, P.C.  
20 1901 Pheasant Lane  
21 Charlottesville, Virginia 22901  
22 SHARON BUCCINO, ESQ.  
23 NATURAL RESOURCES DEFENSE COUNCIL  
24 1200 New York Avenue, NW  
25 Washington, DC 20005

FOR KANE COUNTY, UTAH:

WILLIAM L. BERNARD, ESQ.  
DEPUTY KANE COUNTY ATTORNEY  
76 North Main Street  
Kanab, Utah 84741

FOR THE DIVISION OF OIL, GAS, AND MINING:

STEVEN F. ALDER, ESQ.  
FRED DONALDSON, ESQ.  
UTAH ATTORNEY GENERAL'S OFFICE  
Natural Resources Division  
1594 West North Temple  
Suite 300  
Salt Lake City, Utah 84116

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1 Docket No. 2009-019 Cause No. C/025/0005

2 Wednesday, January 27, 2010

3 (The proceedings began at 10:20 a.m.)

4 CHAIRMAN JOHNSON: Good morning. We will resume  
5 our hearing this morning. This is Docket No. 2009-019  
6 Cause No. C/025/0005. It's in the matter of the Request  
7 for Agency Action of Utah Chapter of the Sierra Club,  
8 Southern Utah Wilderness Alliance, Natural Resources  
9 Defense Council, and National Parks Conservation  
10 Association, Petitioners; Division of Oil, Gas and  
11 Mining, Respondent Request for Board Review of the  
12 Division's October 19, 2009, approval of the Application  
13 of Alton Coal Development, LLC, to Conduct Surface Coal  
14 Mining and Reclamation Operations in Coal Hollow, Kane  
15 County, Utah.

16 Mr. Morris, are you are representing the  
17 petitioner?

18 MR. MORRIS: I am, along with -- if I may  
19 introduce --

20 CHAIRMAN JOHNSON: Yes, please.

21 MR. MORRIS: Sharon Buccino, Steve Bloch, and  
22 Tiffany Bartz.

23 CHAIRMAN JOHNSON: Good morning.

24 Mr. Alder, you're representing the State?

25 MR. ALDER: Yes, Mr. Chairman. And Mr. Fred

[5]

1 Donaldson is also representing the State. He'll be  
2 arguing this morning.

3 CHAIRMAN JOHNSON: Good morning.

4 Mr. Bayer, you are representing the respondent?

5 MR. BAYER: Yes, sir -- good morning -- I am.

6 Also with me, of course, is James Allen.

7 Denise Dragoo has just received notification  
8 that she has to go home. Her father suffered a serious  
9 coronary. She's leaving for Phoenix. But she is of  
10 record. She was going to be making some arguments this  
11 morning on some of the issues. We're going to have to do  
12 some adjustment regarding that, since she now needs to  
13 leave precipitously.

14 CHAIRMAN JOHNSON: Okay.

15 And Mr. Bernard, you are representing intervenor  
16 Kane County?

17 MR. BERNARD: That's correct.

18 CHAIRMAN JOHNSON: Good morning to you.

19 MR. BERNARD: Thank you.

20 CHAIRMAN JOHNSON: This morning we're going to  
21 be hearing several motions which have been entered by the  
22 various parties. We will start off this morning with the  
23 petitioners' request for a hearing examiner.

24 So Mr. Morris, if you would like to proceed,  
25 please.

[6]

1           MR. MORRIS: Yes, sir. May it please the Board,  
2 thanks for the opportunity to address our motion for a  
3 hearing examiner.

4           To us, the appointment of a hearing examiner is  
5 a good idea. It will, in our estimation, enable this  
6 proceeding to reach a conclusion far more quickly and  
7 expeditiously than if the rest of the proceedings are  
8 tried out before the full Board. And it will relieve the  
9 full -- members of the full Board of the need to spend a  
10 great deal additional time on this particular proceeding  
11 than if there is not a hearing examiner.

12           Having said that, we recognize that the  
13 appointment of a hearing examiner is completely within  
14 this Board's discretion. We think it's a good idea,  
15 which we hope the Board will adopt. But if the Board  
16 does not believe that it is the best way to proceed, we  
17 are perfectly happy to present our case to the full  
18 Board.

19           And having said that, we ask that you seriously  
20 consider and grant the motion for a hearing examiner.

21           CHAIRMAN JOHNSON: Thank you, Mr. Morris.

22           Mr. Alder.

23           MR. ALDER: Yes. I'd like to briefly address  
24 that question.

25           It has been suggested that it would not be

[7]

1 appropriate to have a hearing examiner in this matter,  
2 that it's different than the Oil and Gas matters. And I  
3 just refer the to Board to 4010 -- this is the Utah Coal  
4 Act -- Section 6.7. And it refers to matters being heard  
5 before the Board pursuant to its rules. And in the rules  
6 at 645-300-212.300, those rules specifically refer to the  
7 641 procedural rules. And as you are aware, the  
8 procedural rules at 641.13 provide for a hearing  
9 examiner. So we think it's appropriate, or at least it's  
10 certainly not inappropriate; it can be done. Whether  
11 it's appropriate or not is really a question for the  
12 members of the Board.

13           There are a couple of stipulations that have  
14 been suggested by the petitioner, which I assume were  
15 part of his motion. They were in the written materials.  
16 One would be that under the rules, there's an opportunity  
17 for a de novo hearing before the Board. And my  
18 understanding is that if there was a hearing examiner,  
19 the hearing examiner would enter findings. And again,  
20 there is some discretion within the rule for whether it's  
21 just factual findings or complete findings and  
22 conclusions that are reviewed, then, by the Board as a  
23 whole. My understanding is that those would be subject  
24 to question within the record. But there would not -- so  
25 it would be like an appellate-type of argument before the

[8]

1 Board. If any party wanted to object to those findings  
2 made by the hearing examiner, there would not be a de  
3 novo proceeding.

4 I think the second thing that was part of the  
5 motion -- although, again, I'm sure we would all defer to  
6 you -- but the assumption would be that since sometimes  
7 in appointing a hearing examiner, the difficulty is  
8 finding a hearing examiner. It was, I believe, thought  
9 that -- at least none of the parties would object to one  
10 of the Board members serving as a hearing examiner. And  
11 that might facilitate the choice.

12 Having said that, it's certainly not only within  
13 your discretion, it is the most personal type of decision  
14 for the Board to make. So we would defer to whatever  
15 your pleasures are, but with the understanding that you  
16 would have that right.

17 CHAIRMAN JOHNSON: Thank you, Mr. Alder.

18 Mr. Bayer.

19 MR. BAYER: We take a little bit different  
20 posture, and of course we set it out in our response.

21 I don't really believe that under the rules, as  
22 it relates to coal, that the Board is allowed to have a  
23 hearing examiner. Under 4010.3, the definition of  
24 "adjudicative proceeding" specifically says, "a Division  
25 or Board action," and it speaks about the Board.



[9]

1 Whereas, in other provisions of Utah law, where it would  
2 allow a hearing examiner, we don't believe that that's  
3 been incorporated within the provisions for a coal  
4 permit.

5 Specifically, what concerns me the most is the  
6 de novo proceeding. If, in fact, we are required to have  
7 a hearing in front of a hearing examiner, and then  
8 there's the possibility of a de novo hearing before this  
9 Board, it seems a ridiculous waste of effort, and energy,  
10 time, and money to essentially have the same hearing  
11 twice.

12 My position is, is that I trust this Board to be  
13 able to make an informed intellectual decision over the  
14 matters that are presented to it. But I know that from  
15 my experience that it's much easier for you to be able to  
16 weigh the evidence as it's presented to you firsthand,  
17 rather than it is for you to have to look at a dry  
18 transcript to try to make a decision as to whether to  
19 affirm or deny a lower decision. So I think that we're  
20 much better suited to have this Board hear the testimony  
21 that is related directly to the merits involved within  
22 the petitioner's Request for Relief rather than us having  
23 to deal with two different de novo hearings.

24 Secondly, if we are correct that the Utah law  
25 does not contemplate and incorporate the provisions for

[10]

1 allowing a hearing examiner, then the question becomes  
2 whether or not we have had a valid administrative  
3 proceeding. If we have not had a valid administrative  
4 proceeding, then the party that, perhaps, does not get  
5 the relief or order that it desires, it conjures up all  
6 sorts of nightmare circumstances as to what would be the  
7 actual judicial review. And whether or not the hearing  
8 examiner is, in fact, allowed -- if the hearing examiner  
9 has not been allowed and that issue is raised within  
10 judicial review, then we've had no proceeding,  
11 whatsoever. And then the question is whether or not  
12 there was an exhaustion of administrative remedies, and  
13 whether or not we actually have any record that is an  
14 official record to be reviewed with a judicial review.

15 If, in fact, it is not allowed, then for those  
16 of us who are practitioners of law, that is akin to  
17 trying to waive subject matter jurisdiction. You cannot  
18 agree to waive rules and implement a framework for a  
19 hearing that is not allowed by statute.

20 Therefore, we take the position that a hearing  
21 examiner is not allowed under the Utah rules, and that we  
22 ask that the Board go ahead and act as the adjudicatory  
23 body on this as provided for in the regulations.

24 And I'll tell you this, that for those of you  
25 that are concerned about the lengthy number of topics

[11]

1 that are on this morning's docket, we have already taken  
2 tremendous steps to narrow that. We are going to be  
3 presenting to you very, very few items this morning. I  
4 think good practitioners are able to do that. And it is  
5 my hope that we're able to facilitate this Board and be  
6 able to expedite matters on our own, so we are not tied  
7 down in the extent that they would otherwise think that a  
8 hearing examiner would help expedite it. So I think we  
9 can actually narrow the focus, get this put into a  
10 posture where it will be easier for this Board to make  
11 the examination.

12 I prefer that this Board be the examining body,  
13 for the reasons I've stated.

14 CHAIRMAN JOHNSON: Thank you, Mr. Bayer.  
15 Mr. Bernard.

16 MR. BERNARD: Kane County supports Mr. Bayer's  
17 position, and would like to point out that not only are  
18 there problematic issues in the event a hearing officer  
19 were appointed as to subject matter jurisdiction, but as  
20 to due process and equal protection issues, which would  
21 affect Kane County and all of -- the entire process. So  
22 our -- Kane County's view is that in order to find a safe  
23 harbor for both the Board and the parties, so  
24 everything's been properly adjudicated, the Board itself  
25 should hear the matter.

[12]

1 CHAIRMAN JOHNSON: Thank you, Mr. Bernard.

2 Mr. Morris, is there anything else you would  
3 like to say on the matter?

4 MR. MORRIS: Only very briefly to say that  
5 Mr. Alder's presumptions about the petitioner's position  
6 regarding de novo review are correct, and that we do not  
7 believe that a de novo review by the Board of a hearing  
8 examiner's recommendations, findings, or proposed  
9 findings, would be appropriate. We're prepared to take  
10 any measure that the Board would deem reasonable to take  
11 that off the table.

12 Other than that, we believe, again, that it's a  
13 good idea and commend it to the Board for consideration.

14 CHAIRMAN JOHNSON: Thank you.

15 Mr. Alder, anything else?

16 MR. ALDER: Nothing further.

17 CHAIRMAN JOHNSON: Mr. Bayer?

18 MR. BAYER: I think I've already stated it. The  
19 only thing I'm convinced is that we cannot waive that  
20 issue; and therefore, we have to have the Board.

21 CHAIRMAN JOHNSON: Mr. Bernard.

22 MR. BERNARD: Nothing further, other than  
23 Mr. Morris' position makes it clear that there will be  
24 subject matter jurisdiction issues in the event the Board  
25 did not hear the evidence.

[13]

1 CHAIRMAN JOHNSON: Would the Board like to take  
2 any action at this time, or do you want to deliberate on  
3 this during a break today? What's the pleasure of the  
4 Board?

5 MR. JENSEN: Mr. Chairman, I would first like to  
6 make an observation and then a motion.

7 I've listened to the arguments. I believe that  
8 the Board does have the authority to appointment a  
9 hearing examiner. Having said that, however, I, for one,  
10 as a Board member, want to hear this case. And I  
11 therefore move that the motion for appointment of a  
12 hearing examiner be denied.

13 CHAIRMAN JOHNSON: Is there a second?

14 MR. HAROUNY: I'll second it.

15 CHAIRMAN JOHNSON: Seconded by Mr. Harouny.  
16 Any discussion?

17 Okay. All those in favor say "aye."

18 BOARD MEMBERS: Aye.

19 CHAIRMAN JOHNSON: Anyone opposed?

20 Okay. So we'll deny that request for the  
21 hearing examiner.

22 MR. MORRIS: Thank you for your consideration.

23 CHAIRMAN JOHNSON: Thank you, Mr. Morris.

24 The second motion we have this morning is also  
25 from the petitioner, and it deals with request for

[14]

1 discovery.

2 Mr. Morris, would you like to address that?

3 MR. MORRIS: Yes. We have, in discussions  
4 before the hearing, reached a tentative agreement on a  
5 stipulation of discovery. And pending our drafting that  
6 stipulation and signing it, we would propose to defer  
7 argument. And if we reach this stipulation, we'll  
8 withdraw the motion.

9 CHAIRMAN JOHNSON: Okay. So you're deferring  
10 that until later today, I'm assuming. Is that what you  
11 meant?

12 MR. MORRIS: If we can draft the stipulation  
13 today, yes. If not, we have an agreement regarding -- we  
14 think we have an agreement regarding discovery. And so  
15 what we are asking for is the leave of the Board to  
16 either draft that stipulation today if possible, or if  
17 not possible, to leave the matter open until we are able  
18 to draft the stipulation and sign it. At the time that  
19 we have a signed stipulation, we'll withdraw the motion.

20 CHAIRMAN JOHNSON: Okay. Very good.

21 And that's the general understanding of all the  
22 parties of where we're heading on that issue. Is that  
23 correct, at this time?

24 MR. ALLEN: Yes, Mr. Chairman.

25 MR. BERNARD: It is, except Kane County is not a

[15]

1 party to any discovery issues; so therefore, we don't  
2 believe we have a place at the table for that purpose.

3 CHAIRMAN JOHNSON: Thank you.

4 Mr. Alder, that's your understanding?

5 MR. ALDER: Yes. And I think that it's probably  
6 a little less tentative than it may sound. I think the  
7 parties have discussed this, as you know, for some  
8 length, that we have a pretty firm understanding that  
9 discovery will be allowed under certain conditions,  
10 including, I think, the motion with regard to a site  
11 visit. And so I just advise the Board that we join -- we  
12 are grateful and think it's a good move by everybody to  
13 move this thing forward, and I think it will be  
14 completed.

15 CHAIRMAN JOHNSON: Okay, thank you.

16 MR. JENSEN: Mr. Chairman?

17 CHAIRMAN JOHNSON: Yes.

18 MR. JENSEN: Would it be appropriate, or maybe  
19 the parties contemplate, but that the stipulation also  
20 have an accompanying proposed order so that we don't have  
21 to have an issue about whether the order meets the --  
22 what the parties intended in the stipulation? Would that  
23 be okay?

24 MR. ALDER: That would be a good idea.

25 MR. MORRIS: Certainly agreeable to the

[16]

1 petitioners.

2 MR. BAYER: I think that's appropriate.

3 And if I might add, I didn't know that you  
4 weren't going to want us to discuss it prior to  
5 Mr. Alder, so that was why I was sitting here silently.

6 CHAIRMAN JOHNSON: Oh, I'm sorry. Got the  
7 batting order out of line.

8 MR. BAYER: You had me confused.

9 CHAIRMAN JOHNSON: Okay.

10 MR. BAYER: Just to the extent that I agree with  
11 Mr. Alder, I think it's not as nearly as tentative as it  
12 might sound. I think we've come to some very concrete  
13 terms. I would ask that the parties, today, hammer out  
14 the stipulation, present it to you immediately, and then  
15 we do not adjourn today without a stipulation. Even if  
16 we need to have it dictated into the record. I would  
17 prefer to do that so that everybody leaving here today is  
18 on the same playing field.

19 MR. MORRIS: We're agreeable to that.

20 MR. ALDER: Yes.

21 CHAIRMAN JOHNSON: I think the Board is, also.  
22 Just ask the parties to bear in mind that it will be a  
23 joint motion, and then it's up to the Board to decide  
24 whether or not to accept that motion.

25 MR. BAYER: Correct.



[17]

1 CHAIRMAN JOHNSON: Okay. Then let's move  
2 forward to the third request.

3 That's a request by the Division -- motion by  
4 the Division for a partial dismissal. And I believe that  
5 the request for partial dismissal overlaps in several  
6 areas with the request by the respondent's, Alton Coal  
7 Development, motion for partial summary judgment. And I  
8 believe we're going to be discussing those items jointly.  
9 Is that correct?

10 MR. ALDER: Yes.

11 MR. BAYER: Well, let me state that the only  
12 problem I have with that, right now, is the sudden  
13 disappearance of Ms. Dragoo, who was going to be  
14 addressing those issues on behalf of Alton. We would  
15 like, if possible, that prior to the time that we get  
16 into the actual discussion of those issues, that we have  
17 a few minutes so that we might regroup and figure out  
18 exactly the manner in which we're going to present those  
19 issues.

20 There are some other issues that I think that we  
21 can take that are preliminary, even to those discussions  
22 on the motions to dismiss, that might well be worthwhile,  
23 and then we can get those out of the way, as well.

24 CHAIRMAN JOHNSON: Okay. I believe the parties  
25 have been able to pare down what we're going to be doing

[18]

1 today significantly

2 MR. BAYER: If I may speak, Mr. Chairman.

3 There's actually been two sets of motions to dismiss.

4 There's a hydrologic set and non hydrologic set. The

5 parties have agreed that as far as the hydrologic set,

6 we're going to pass those for today's purposes. For a

7 variety of reasons, we think it's probably better than to

8 belabor the Board with that material today. We would

9 like to pass that until a later date.

10 There was an objection filed by the petitioners

11 to the manner of whether or not this Board had the right

12 to conduct a summary judgment examination. So we have, I

13 think, amongst ourselves agreed that rather than style

14 the summary judgment, whatever it might be, that the

15 motions to dismiss will be considered as motions to

16 dismiss rather than a summary judgment issue. And we've

17 agreed to style our motions as motions to dismiss rather

18 than motions for summary judgment. So we will join in

19 with the Division on the standard of it being a motion to

20 dismiss. And that obviates a whole inquiry as to whether

21 or not there could be a summary disposition or a summary

22 judgment. We don't have to worry about that debate

23 today.

24 And so to that extent, I think we have basically

25 eliminated today's entire docket, but for the discussion

[19]

1 of the non hydrologic issues, if I am correct.

2 MR. ALDER: Yes. If I might just, since it's  
3 our motion. As I understand it, we did join in the one  
4 hydrologic issue that was separately briefed, and that,  
5 we understand, will not be heard. So we'll just be  
6 arguing the non hydrologic portion of the motion to  
7 dismiss.

8 MR. BAYER: And I'm not speaking for Kane  
9 County, but I believe that they're not going to want to  
10 discuss their motions today, either.

11 MR. BERNARD: That's correct. And the reason  
12 for Kane County is, I have not yet seen the response from  
13 the petitioners. I believe Mr. Morris was kind enough  
14 to, in a sense, stipulate. He said that he would not  
15 debate that on behalf of petitioners, as far as  
16 continuing the matter -- the hearing in the matter until  
17 another date.

18 MR. MORRIS: That's correct.

19 CHAIRMAN JOHNSON: We appreciate the efforts of  
20 the parties in agreeing and trying to pare down these  
21 proceedings.

22 But I just do want to remind all the parties  
23 that it is the decision of the Board as to whether or not  
24 these things will be heard today or not.

25 MR. MORRIS: Understood.

[20]

1           CHAIRMAN JOHNSON: Mr. Alder, then, I think  
2 we're to you.

3           MR. ALDER: Yes. Mr. Donaldson will be arguing  
4 our motion.

5           CHAIRMAN JOHNSON: Mr. Donaldson, good morning.  
6 Please go ahead.

7           MR. DONALDSON: Good morning, Members of the  
8 Board. Fred Donaldson representing the Division. I'll  
9 try to keep my discussion brief. I know we have a lot of  
10 ground to cover. We've already covered a lot of ground.  
11 And I'll do my best to answer any questions you may have  
12 along the way.

13           As Mr. Alder pointed out, and as counsel has  
14 agreed, today we're only looking at discussion of the non  
15 hydrologic issues. The Division has filed a motion to  
16 dismiss some of the insubstantial claims that require no  
17 factual development.

18           The Board can dismiss claims in the Request for  
19 Agency Action where no relief can be granted. In other  
20 words, the Board is empowered to dismiss a claim in a  
21 situation where, even if the factual allegation is true,  
22 there is no available relief; for example, the  
23 petitioner's claim that the Division did not consider the  
24 Panguitch Historic District in its analysis of cultural  
25 and historic resources. The Board can dismiss this

[21]

1 claim, even if it is true that the Division did not  
2 consider the impacts of mining operations on the  
3 Panguitch Historic District, since the Division was not  
4 required by law to consider those impacts.

5 The Board does not have authority to provide  
6 relief for that claim since the law doesn't provide  
7 relief for that factual allegation. In other words, the  
8 claim can be dismissed because the allegation, even if  
9 true, does not state a valid legal claim within the  
10 purview of the Coal Act or the applicable regulations.

11 The Board should dismiss the insubstantial  
12 claims in order to focus the hearing on the other claims.

13 I'll now discuss why the Board should dismiss  
14 the claims related to cultural and historic resources,  
15 air quality, and wildlife.

16 In a motion to dismiss, the Board should look at  
17 the four corners of the Request for Agency Action and  
18 decide whether each claim states a valid factual  
19 allegation with relief at law. The parties don't  
20 disagree that the Board can dismiss claims for failing to  
21 state a proper claim. The Board should dismiss the claim  
22 that the Panguitch National Historic District should have  
23 been analyzed. The Division complied with the applicable  
24 laws and regulations.

25 CHAIRMAN JOHNSON: Do you have a slide

[22]

1 presentation? Is that what you're doing?

2 MR. DONALDSON: Yeah, we just have a little bit  
3 of administrative rules.

4 The Division was not required to consider the  
5 effects of the coal mining operations on the Panguitch  
6 National Historic District because the Division is only  
7 required to consider cultural and historic resources --  
8 effects on cultural and historic resources that are  
9 within the permit area or adjacent area. And the  
10 Panguitch National Historic District is not within the  
11 adjacent area.

12 This is Rule 411 -- 645 -- I left out 301.  
13 Excuse me. This is Rule 645-301-411.140. It says, "The  
14 application will contain maps as described" --

15 CHAIRMAN JOHNSON: 141?

16 MR. DONALDSON: I'm sorry.

17 CHAIRMAN JOHNSON: Oh, it's 140. Excuse me.

18 MR. DONALDSON: It's 140. So "The application  
19 will contain maps as described under Rule 645-301-411.141  
20 and a supporting narrative which describes the nature of  
21 cultural and historic resources listed or eligible for  
22 listing in the National Register of Historic Places and  
23 known archeological sites within the permit and adjacent  
24 areas." And then it goes on to talk about where that  
25 description will be coming from.

[23]

1           So it becomes clear from the reading of this  
2 rule that the Board -- or that the Division is only  
3 required to consider impacts on cultural and historic  
4 resources that are located within the permit area and  
5 adjacent areas. The Panguitch District is located  
6 30 miles from the permit area, so that's not even in  
7 question.

8           Now the question is whether the Panguitch  
9 National Historic District should be considered within  
10 the adjacent area for cultural resources. And the Rule  
11 states, again, that "adjacent area" means, "The area  
12 outside the permit area where a resource or resources,  
13 determined according to the context in which adjacent  
14 area is used, are or reasonably could be expected to be  
15 adversely impacted by proposed coal mining and  
16 reclamation operations, including probable impacts from  
17 underground workings." This is directly from the  
18 regulations. It's the definition of "adjacent area."

19           The Division has determined, or rather the  
20 Division did not include the Panguitch National Historic  
21 District within its analysis, because it did not  
22 determine that the Panguitch District was within the  
23 adjacent area.

24           As it says in the statute, it says that the  
25 adjacent area is an area determined, according to the

[24]

1 context in which adjacent area is used, where impacts  
2 could reasonably be expected to be felt.

3 Now, it isn't reasonable to expect impacts from  
4 the coal mining operations based on the context of the  
5 Panguitch National Historic District. The primary coal  
6 haul route is Highway 89, US Highway 89. And as the  
7 Board saw from the Division's motion, it should have  
8 received a map of that. And I'm sorry, I don't have the  
9 map of that with me. But Highway 89 runs through the  
10 Panguitch National Historic District -- again, which is  
11 located 30 miles from the mining site.

12 Now, it's been argued that, or it seems to be  
13 argued that the Division is required to consider all  
14 impacts -- all possible impacts on anything that might  
15 have any relationship to coal, even the coal haulage.  
16 Now, the question is whether in the context the impacts  
17 could be reasonably expected -- or adverse impacts could  
18 be reasonably expected. Because Highway 89 is a heavily  
19 used transportation route, the Division did not  
20 include -- did not believe that cultural and historic  
21 resources along Highway 89 would be -- it was reasonable  
22 to believe that they would be adversely affected. Excuse  
23 me as I'm trying to articulate this.

24 But the Division made a determination that,  
25 based on the context of the resource, that Highway 89 --



[25]

1 being heavily used -- no, there was no reasonable  
2 expectation of adverse impacts on the Panguitch National  
3 Historic District. Therefore, since it was not in --  
4 therefore, it's not within the adjacent area.

5 The language referring to -- you may have seen  
6 in the briefs the language referring to "affected area."  
7 "Affected area" also has a particular definition in the  
8 Code rules. The only relevant question, however, in this  
9 discussion, is whether the district is located within the  
10 adjacent area. The Division did not find that it was  
11 located within the adjacent area. It's a legal  
12 determination. The Board -- the Division made this  
13 determination; and it's purely a legal question that  
14 requires no factual development.

15 Moving on to air quality -- unless there are  
16 questions with regard to this issue.

17 CHAIRMAN JOHNSON: Go ahead and move on,  
18 Mr. Donaldson.

19 MR. DONALDSON: The Division and ACD, the  
20 operator, the permit applicant, have complied fully with  
21 the requirements of the Coal Act with regard to air  
22 quality permitting. Here are the applicable regulations  
23 related to what is required for -- in terms of air  
24 quality -- air pollution control. It says, "For all  
25 surface coal mining and reclamation activities with

[26]

1 projected production rates exceeding 1 million tons of  
2 coal per year, the application will contain an air  
3 pollution control plan, which includes the following: An  
4 air quality monitoring program to provide sufficient data  
5 to evaluate the effectiveness of the fugitive dust  
6 control practices proposed under Rule 645-301-423.200 to  
7 comply with Federal and Utah air quality standards and a  
8 plan for fugitive dust control practices as required  
9 under the other two rules."

10 Now, the language that I want to emphasize is  
11 underlined and in bold. There is no question that the  
12 permit contains a fugitive dust control plan as required  
13 by the rule. The question is whether -- or the  
14 petitioners have attacked the sufficiency of the plan.  
15 The appropriate place to -- however, to attack that plan,  
16 whether it complies with Federal and Utah air quality  
17 standards, is before the Utah Department of Air Quality.  
18 Now, the fugitive dust control plan has been submitted to  
19 the Utah Department of Air Quality for evaluation for  
20 compliance with air quality standards. And if DAQ's  
21 experts find that the plan, including the use of EPA  
22 Method 9, is adequate, the Division isn't going to  
23 second-guess their determination. They are the air  
24 quality experts in the state. And the plan that has been  
25 presented just needs to comply with Federal and Utah air

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1 quality standards. They make that determination.

2 Now, if petitioners disagree with the  
3 determination of the Division of Air Quality, they can  
4 appeal that determination before the Air Quality Board.  
5 It's not for this Board to decide whether the air  
6 pollution -- or the fugitive dust control plan complies  
7 with Federal and Utah air quality standards. That is up  
8 to the Division of Air Quality. And they are reviewing  
9 the plan and will have to sign off on the final plan.

10 The "nice guy" issue should also be dismissed.  
11 There's simply no law requiring the Division to consider  
12 impacts on the clarity of the nice guy, as seen from  
13 Bryce Canyon or the Dixie National Forest. The  
14 interaction between the Federal process and the State  
15 process at one time led to a deficiency in a technical  
16 analysis that has since been withdrawn.

17 Now, the federal NEPA process may be required to  
18 consider nice guy issues in Bryce Canyon and Dixie  
19 National Forest. But there is no state requirement to  
20 consider those. You are looking at the requirement  
21 within the law for what's required.

22 They make a citation -- one of the citations  
23 was -- it says, at the very bottom, "A plan for fugitive  
24 dust control" -- excuse me -- "practices as required  
25 under 645-301-244.100." And this is that statute. It

[28]

1 says, "All exposed surface areas will be protected and  
2 stabilized to effectively control erosion and air  
3 pollution attendant to erosion." And this has been done.  
4 This basically is what is addressed in the fugitive dust  
5 control plan that has been submitted to the Utah  
6 Department of Air Quality. Even with the factual  
7 allegations they've made regarding air quality, there's  
8 simply no legal relief that can be granted for this  
9 claim; and it should be dismissed.

10 Now, moving into the wildlife protection. In  
11 the Request for Agency Action, the petitioners basically  
12 made two claims. First they say, "The Department of" --  
13 excuse me. "The Division of Wildlife Resources has not  
14 approved the wildlife protection plan that was proposed  
15 by Alton Coal Development. And second, that the  
16 application doesn't contain a specification of measures  
17 that ACD will take to monitor or limit roadkill. Neither  
18 of these is required by law." Okay.

19 What's required by law is that the permit  
20 application include, as located -- as found here in Rule  
21 645-301-330, "Each application will contain a plan for  
22 protection of vegetation, fish, and wildlife resources  
23 throughout the life of the mine." And second, "Each  
24 application will include fish and wildlife resource  
25 information for the permit area and adjacent areas."

[29]

1           There is a wildlife protection plan located  
2           within the permit application. Therefore, they have  
3           complied with the provision -- with both provisions. And  
4           they are not required to have a roadkill protection plan.  
5           Even though they're not required to have that plan, they  
6           actually do address roadkill issues, and those citations  
7           to those -- to the fact that they address those are  
8           located in their brief and also in our brief.

9           Now, an important point to make here is that  
10          there is no legal requirement that the plan either, one,  
11          address roadkill, or two, the Division of Wildlife  
12          Resources approve the plan. There is a provision in the  
13          statute -- and I'm sorry I don't have that -- I don't  
14          have that regulation with me -- but there is a provision  
15          that says that the Division will consult with the  
16          Division of Wildlife Resources. And they have done that,  
17          and there has been no allegation that they haven't done  
18          that.

19          Wildlife Resources is not required to approve  
20          any plan or anything that the Division has done. And  
21          therefore, for these reasons we ask that this claim also  
22          be dismissed.

23          Oh, the rule is Rule 322 -- excuse me,  
24          645-301-322.100. It states, "The scope and level of  
25          detail for such information" -- information contained in

[30]

1 322, which you're looking at right here, fish and  
2 wildlife resource information -- "will be determined by  
3 the Division in consultation with state and federal  
4 agencies with responsibilities for fish and wildlife and  
5 will be sufficient to design the protection enhancement  
6 plan required" by additional regulation. So basically it  
7 says the scope and level of detail is determined by the  
8 Division in consultation with the state agency. There's  
9 nothing about approval in this regulation.

10 Members of the Board, the Board should dismiss  
11 the claims identified by the Division in order to focus  
12 the hearing on the other claims. These claims, as laid  
13 out, are legally deficient and can be decided without any  
14 factual development. The Board should dismiss the claim  
15 that the Division was required to analyze the impacts of  
16 mining on the Panguitch Historic District because the  
17 Panguitch Historic District is not located within the  
18 adjacent area for cultural and historic resources.

19 Second, the Board should dismiss the air quality  
20 claims because the Division and ACD have adopted a  
21 fugitive dust control plan as required by rule and in  
22 consultation with Division of Air Quality, and because  
23 Division of Air Quality will sign off on that prior to  
24 any air quality permits being issued, and because there's  
25 no law requiring the analysis of the clarity of the night

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1 sky.

2 And third, the Board should dismiss the claims  
3 about sage grouse and wildlife protection because the  
4 Division is not required to obtain approval from the  
5 Division of Wildlife Resources, and because no roadkill  
6 plan is legally required.

7 Even if the factual allegations in petitioner's  
8 claims are true, the Board should dismiss these claims  
9 because the law does not provide relief for those  
10 allegations. The Division respectfully requests the  
11 Board grant its motion to dismiss. That's all I have.

12 CHAIRMAN JOHNSON: Thank you, Mr. Donaldson.

13 Does the Board have any specific questions for  
14 Mr. Donaldson at this time? Okay.

15 I believe we're moving to you, Mr. Bayer.

16 MR. BAYER: I guess we're up then, huh?

17 CHAIRMAN JOHNSON: Yes, sir.

18 MR. BERNARD: All right. I think that the  
19 Division has framed the issues exceptionally well,  
20 candidly. But I think one of the things that this Board  
21 needs to keep in mind, which is of most critical  
22 importance, is the multi-faceted aspect of what is the  
23 Board's function in regard to the permit.

24 The Board has already determined that it will  
25 defer to the Division's technical expertise. Do not lose

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1 site of that, because if we're dealing with something  
2 that's based upon the technical expertise of the  
3 Division, then you've already made the decision that  
4 you're going to defer to that technical expertise.

5 Secondly, a permit challenge is not based upon a  
6 concept of what would somebody else do if they were the  
7 decision maker, for making the decision on whether or not  
8 the permit should or should not be issued. So in other  
9 words, if a petitioner, somebody is protesting the  
10 issuance of a surface coal mining permit, it's not  
11 whether or not they would have issued the permit; it's  
12 not whether or not they would have required more; it's  
13 not whether or not they feel that the permit application  
14 package is insufficient. The standard is whether or not  
15 the rules and regulations by which every permit applicant  
16 is bound to follow has satisfied the requirements of the  
17 permit application process.

18 So while the petitioners might say, We wish  
19 there would be more information; we would like to see  
20 this in there; we don't think that this was addressed;  
21 that's not the inquiry. The inquiry is whether or not  
22 Alton is required to produce that material.

23 If we look at these issues that have been  
24 presented by the Division, and if you analyze them in the  
25 same fashion as -- which the Division has reviewed and in



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1 the same fashion which Alton has presented, there is  
2 no -- for those of us who are practitioners, there is no  
3 genuine issue of material fact. In other words, it  
4 doesn't make any difference whether or not there would be  
5 discovery that could be had on these matters. It will  
6 make no difference.

7 If, in fact, Alton has not presented a wildlife  
8 plan other than that which is in the record, then that's  
9 correct. What is in the record is in the record. If  
10 that is sufficient to satisfy the requirements of the  
11 rules and regulations related to a permit application,  
12 then it's sufficient. This Board will have the  
13 opportunity to look at the regulations, look at what is  
14 in the permit application package, and then make a  
15 decision as to whether or not it is or is not sufficient.

16 We maintain that all of the provisions that are  
17 required are complete and they meet the rules and  
18 regulations. So if, in fact, there is any argument  
19 presented by the petitioners that these topics are not  
20 ripe for discussion because there is discovery that is  
21 required to be had upon these topics, I think the  
22 Division has framed this perfectly correct; and that is,  
23 as a matter of law, it makes no difference what facts  
24 could be developed, might be developed at a later date,  
25 because this is not a factual issue.

[34]

1           If you look at the circumstances as it relates  
2 to Panguitch -- and we'll take the issues of Panguitch  
3 first. If the petitioners are correct in their  
4 assumption that there must be something more in the  
5 permit application regarding the effects upon the  
6 community of Panguitch, then basically what they are  
7 telling to the Board, without coming out and telling this  
8 Board that, Panguitch must then be included within the  
9 permit. And if you start taking a position as a Board  
10 that Panguitch must be included within the permit  
11 application package, then what you're doing is, you're  
12 setting a standard that is unlimited in scope, unlimited  
13 in boundary as to what then becomes part of a permit.

14           If I must do something beyond that which is  
15 already included within the permit, then there becomes an  
16 issue as: Do I then have to bond Panguitch? Do I then  
17 have to go in and reclaim Panguitch? What is it that I  
18 have to do? And this tends to exacerbate the whole  
19 review process by the Division, because the definitions  
20 of the areas that I must include within a permit, whether  
21 it be an affected area, I've got to have that for all  
22 practical purposes in my permit area. If it's an  
23 adjacent area, while it's not in my permit, an adjacent  
24 area has never, as far as I can determine, been  
25 considered to include a public area that is 30-some-odd

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1 miles away.

2 The requirements that are set out as far as what  
3 Alton must show, and as the Division has already  
4 articulated and highlighted for you, were met. We did  
5 put provisions in there. We did show maps. And if you  
6 look at the 411-141 provisions, it says that we must  
7 include maps; and we've got to show the boundaries of any  
8 public park or locations of any cultural resources,  
9 listed or eligible for listing at the National Register  
10 of Historic Places and known archeological sites within  
11 the permit adjacent areas, and so on and so forth. We  
12 did that. Even though we don't believe that Panguitch is  
13 part of the "adjacent areas," because ultimately Alton  
14 will be looking at further -- hopefully at further  
15 development into a federal area. And in response to  
16 request for information, Alton included that material in  
17 the permit application.

18 Now, that doesn't mean that Alton says that  
19 Panguitch is part of the adjacent area. We do not  
20 acknowledge that. And the argument has been made that,  
21 because we included any materials in the permit  
22 application package, we automatically accepted the fact  
23 that Panguitch would be part of the adjacent area. That  
24 is not true.

25 Secondly, much has been made about the

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1      circumstance of Highway 89. For as long as I have been  
2      practicing law in the mineral field -- in coal, which is  
3      now since the mid-80s -- I have never been required or  
4      know successfully that a permittee will have to permit a  
5      federal highway to the extent that it is open to the  
6      public and utilized by the public. If I am required to  
7      now show 89 as being part of my permit, I have to permit  
8      it; I have to make it as part of my permitted area; I  
9      have to bond it; and then I'm going to have to go out and  
10     do whatever reclamation is associated with that.

11             While the petitioners argue to you that there is  
12     no case law, there is no statute that specifically  
13     excludes federal highways -- these public roadways --  
14     from the affected areas or the adjacent areas, that's not  
15     our responsibility to show that. And again, this goes  
16     back to the premise of what we're dealing with.

17             The petitioners have the burden to prove that  
18     what has been done in relationship to this permit  
19     application package is incorrect. They have the burden  
20     to show the error. It is not the responsibility by  
21     either the Division nor Alton to come forward and prove  
22     the legitimacy of the permitting process. It is not our  
23     responsibility, nor the responsibility of the Division,  
24     to prove the legitimacy of all the laws and statutes that  
25     are in place. We do not have to recreate, reconstruct,

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1 and prove that the permitting process is legitimate. It  
2 is presumed to be legitimate. Utah has been granted its  
3 primacy from out of the federal government. All of the  
4 rules and regulations of Utah have been approved by the  
5 federal government, and it is presumed that the Utah  
6 program is both legitimate, legal, and enforceable.

7 So going back now to the road issue, I don't  
8 have to prove that I have to exclude 89. They must prove  
9 that I have to include 89. Their argument, as part of  
10 their response to the motions, was that you're going to  
11 have hundreds of coal trucks traveling this road through  
12 the community of Panguitch. Well, this is a very, very  
13 busy highway. I have been told that there are  
14 probably -- and we'll be able to show this -- but there  
15 are probably over 900 heavy trucks that travel through  
16 Panguitch a day, already.

17 We're going to have -- let's say we have --  
18 let's say we have 150 truck loads of coal that go through  
19 Panguitch. As a truck goes through Panguitch, it's full.  
20 As it comes back, it's empty. So obviously there's no  
21 adverse impact, because an empty truck is going to be  
22 less impact than a motor vehicle.

23 So the point is, is if, in fact, I do run coal  
24 through Panguitch -- and there's no guarantee yet that I  
25 do run coal through Panguitch -- I will have probably a

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1 minimal impact compared to the traffic that is already  
2 there. But yet they're saying that my coal trucks, I now  
3 have to make provisions to protect Panguitch from  
4 something that it is already experiencing, and that I  
5 have to take responsibility for that which is already  
6 occurring in Panguitch, and I get to have sole  
7 responsibility in the burden for caring for it. That  
8 seems fairly absurd, because no one can foist upon Alton  
9 responsibility that any other interstate carrier will not  
10 have to bear. That's an interesting topic unto itself.  
11 However, when you are dealing with the truck traffic  
12 through Panguitch, there is no plausible basis to require  
13 that we incorporate 89 within the permit.

14 I think that all the other issues, as far as  
15 Panguitch, are very, very succinctly resolved by:  
16 There's no requirement to do anything more than that  
17 which was already done, and Alton has satisfied all the  
18 requirements set out. And the petitioners have not  
19 shown, as a matter of law, that there is anything that is  
20 more required than that which has already been placed in  
21 the permit application. And until they can get over that  
22 threshold -- which they cannot -- there is no claim for  
23 them to present. And that's the whole basis of what the  
24 Division has already articulated.

25 Similarly, when we talk about things such as air

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1 quality and wildlife, there are specific provisions for  
2 that which a permittee must put within a permit  
3 application. Alton complied with all of those. Imagine  
4 this -- and I'm sure you're all aware of this -- the  
5 Division basically goes through a checklist process. It  
6 knows what all the regulations are, it knows what all the  
7 rules are, all the statutes that must be complied with to  
8 evaluate a permit application. In the checklist it goes  
9 through, "Have they met the requirements for the  
10 following things." Among the "following things" is,  
11 we've got to put in a dust control plan. Now, they are  
12 required -- Utah requires that this dust control, this  
13 fugitive dust control plan, be reviewed by the Division  
14 of Air Quality and that we have to go through that  
15 process. It's consulted -- and that's what the  
16 regulations talk about, is consulted. They were  
17 consulted. The documentation is in the record to show  
18 the Division of Air Quality had an opportunity to comment  
19 on it, sent back the comment to the Division, and then  
20 the Division acted upon it.

21 Now, this goes back to, again, the deference to  
22 the technical expertise. There has been a dust  
23 control -- a fugitive dust control plan that has been put  
24 into the permit application package by Alton. And the  
25 Division has determined that it satisfies the technical

[40]

1 requirements of a statutory framework and the regulatory  
2 framework. It's there.

3 This Board must now say that Utah law and  
4 federal law requires more than what is on this checklist  
5 for this to be an issue. And you have to say that. You  
6 have to come out and say that the entire permitting  
7 process is flawed, and that the Division's attempt to  
8 comply with the Division -- with the permitting process  
9 is incorrect. Because the Division is telling you, These  
10 are the requirements that a permit application must  
11 contain. And Alton is telling you, We complied with that  
12 and the Division concurs.

13 On the issue as to the lights, the bright sky,  
14 I'm not exactly sure what the issue really is. When the  
15 petition was filed, it seemed that they were arguing that  
16 there was going to be light pollution. And there was a  
17 letter in -- that was submitted from, I believe, the  
18 Forest Service to somebody, and they were talking about  
19 concerns over light pollution. Well, it's many, many  
20 miles away. And that is not a topic for a permit  
21 application for coal mining. Now, they may come into  
22 some consequences that relate to something else, but  
23 light pollution is not the part of the permit application  
24 package for a distant far. That's No. 1.

25 And secondly, there is no issue. If the Board



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1 has any concern, there is no issue.

2 But now it seems within the response to the  
3 motions to dismiss, that they're raising some sort of  
4 issue that there would be a dust problem that would cause  
5 light diffusion, or some other matter.

6 The dust control issue is already addressed. It  
7 has been addressed, and it has been satisfied. There is  
8 no requirement, no jurisdiction, no legal basis for the  
9 state of Utah to now require more of a permit applicant  
10 as regards something that is many, many, many miles away,  
11 because of the fact the fugitive dust control plan is  
12 designed to do that, control the dust. It has satisfied  
13 the requirements under the regulations as to what it will  
14 do to control the dust. Again, the technical evaluation  
15 has been made.

16 So it's not a situation that Alton failed to  
17 comply with these regulations. Petitioners are not  
18 satisfied with it. And this goes back to what I said at  
19 the very beginning. They are not the ones with the  
20 discretion to decide whether or not the permit should  
21 have been issued, and they're not the ones that get to  
22 decide what should or should have not been involved with  
23 that.

24 On the wildlife protection, the arguments are  
25 all exactly identical. There is a requirement under the

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1 regulations that we must take into consideration the  
2 wildlife protection plan. It was reviewed, there was  
3 consultation made on that, and it had come back to the  
4 Division for review, and the Division has determined it  
5 to be complete and appropriate. There is no requirement  
6 under Utah law, there's no requirement under federal law,  
7 that the Utah Division of Wildlife Resources must sign  
8 off on this. And they can show no regulation that  
9 requires that.

10 The petitioners cannot require Alton to perform  
11 that which is not required by regulation. And again,  
12 they may not be happy with it, but it doesn't mean that I  
13 have to do what they want.

14 Fundamentally, Alton has complied with the  
15 requests on the wildlife protection plan -- on the  
16 mitigation plan for wildlife and the roadkill issue. And  
17 the provisions are there. And they address it. They  
18 address it in the exact manner as required. In some  
19 respect, Alton went beyond what is required by  
20 regulation. I don't think Alton should be punished for  
21 going beyond what is required, and I don't think that an  
22 inference should be made that just because Alton, in some  
23 areas, went beyond what is required, that they have now  
24 foisted themselves in a whole new avenue for scrutiny.

25 So I think these issues, very succinctly are:

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1 That the regulations set out very specific criteria that  
2 must be complied with; the permit application package  
3 includes the materials to satisfy those regulations; and  
4 it is not up to the petitioners to decide that there are  
5 more requirements; and that this Board has the right to  
6 look at these provisions and say they've complied with  
7 it, there's nothing further to review.

8 CHAIRMAN JOHNSON: Are you through, Mr. Bayer?

9 MR. BAYER: I'm sorry?

10 CHAIRMAN JOHNSON: Are you through?

11 MR. BAYER: I think that is --

12 CHAIRMAN JOHNSON: For now?

13 MR. BAYER: Yes, sir.

14 CHAIRMAN JOHNSON: Thank you. Mr. Bernard, you  
15 filed a memorandum in support of respondent's motion for  
16 partial summary judgment.

17 MR. BERNARD: I did.

18 CHAIRMAN JOHNSON: And did you want to address  
19 that, or is that -- is that what we're doing next?

20 MR. BERNARD: Well, I just think that on the  
21 issues currently that Mr. Bayer just addressed, I just  
22 want to say that Kane County concurs with both Division's  
23 counsel and Mr. Bayer. And as far as the issues on the  
24 air quality, that there may be both jurisdictional due  
25 process and equal protection issues there, which Mr.

[44]

1 Bayer has addressed. It almost seems as though  
2 petitioners are trying to have it both ways.

3 There's a jurisdictional issue, obviously, on  
4 air quality. If Air Quality Division has control over  
5 the air quality, and now all of a sudden petitioners  
6 wants the Board to go back and seek a review of that,  
7 that brings up equal protection. Because equal  
8 protection requires persons similarly situated be treated  
9 similarly. Are we now going to revoke the permits on all  
10 other mines in Utah that were permitted, trusting Air  
11 Quality to provide the evaluation? Are we going to say,  
12 well, no, we're going to violate the due process rights  
13 of this ACD and allow them to be treated differently?  
14 Are we going to -- on the night skies issue, are we going  
15 to say that NEPA is no longer the controlling factor?  
16 It's the same issues there.

17 On the other issues, I think both Division's  
18 counsel and Mr. Bayer spoke elegantly.

19 As far as the motion for summary judgment -- my  
20 support on the motion for summary judgment, I think that  
21 it's confined to just what's before the issues I just  
22 addressed because of Ms. Dragoo's absence today.

23 CHAIRMAN JOHNSON: Does the Board have any  
24 specific questions for Mr. Bayer or Mr. Bernard at this  
25 time --

[45]

1 MR. JENSEN: No, but I heard Mr. Bernard refer  
2 to motions for summary judgment. It's my understanding  
3 that you are now treating them as motions to dismiss --

4 MR. BAYER: Yes, sir.

5 MR. JENSEN: -- consistent with the Division.

6 MR. BERNARD: That's correct. I stand  
7 corrected.

8 MR. JENSEN: Okay. Thank you.

9 CHAIRMAN JOHNSON: Okay. Let's move on, then.

10 Ms. Buccino, you're addressing this?

11 MS. BUCCINO: Yes. Sharon Buccino, and I'm  
12 responding for the petitioners and opposing the motion to  
13 dismiss on the three non hydrology issues -- the cultural  
14 resources, air quality, and wildlife.

15 Mr. Bayer did delve into a number of issues of  
16 factual dispute. Just to pull back and frame it in the  
17 context that's before the Board right now, what the Board  
18 does need to address and we will lay out is, as Mr. Bayer  
19 said, there are certain requirements, mandatory  
20 requirements in the regulations that the permit  
21 application has to have before the Division can approve  
22 it. And for cultural resources, air quality, and  
23 wildlife, our argument is that the application did not  
24 contain matters -- substance that the regulations clearly  
25 mandate have to be there.

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1 I'd like to start with the cultural resource  
2 issue. And the question really is: Was there an  
3 obligation to look at the impacts on the Panguitch  
4 National Historic District. The Division stated today  
5 that a determination had been made that it was not  
6 necessary to do so. I'd just like to clarify that  
7 actually in the technical analysis -- the final technical  
8 analysis supporting the permit approval, the deficiency,  
9 the failure to identify and analyze the impacts on the  
10 Panguitch National Historic District was identified  
11 there. And so actually, the determination that was made  
12 was that there was inadequacy there. And the problem is,  
13 the permit application did not address it.

14 Now, the Division is arguing, now, that there is  
15 not a legal obligation to do that. And so that's what  
16 I'd like to address. Clearly, the petitioners have to  
17 spell out, in the regulations, the duty to analyze the  
18 Panguitch National Historic District.

19 And that flows directly from the obligation to  
20 look at the impacts from both the permit area and  
21 adjacent areas. Mr. Donaldson put up the applicable  
22 regulation defining "adjacent areas," which comes from --  
23 its R645-100-200. And the language there that he put up  
24 before was, an adjacent area includes an area that, and I  
25 quote, "reasonably could be expected to adversely impact

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1 the impacted by proposed coal mining and reclamation  
2 operations."

3 The Division, itself, had determined that it  
4 could be reasonably impacted by the hundreds of new trips  
5 by the coal haul trucks through the Panguitch National  
6 Historic District. So "adjacent areas" does include the  
7 Panguitch National Historic District.

8 I'd also like to flag for the Board, in addition  
9 to the permit regs, there is a statutory duty under the  
10 Utah Code that any state agency, before engaging in an  
11 undertaking, evaluate the adverse impacts on cultural and  
12 historic resources. So in interpreting the --  
13 interpreting the permit, the coal permit regulations, it  
14 does need to be interpreted in a way that's consistent  
15 with that Utah statutory duty related to cultural  
16 resources.

17 I'd also like to explicitly address the issue  
18 that was put forward related to whether the haul roads  
19 are, in fact, part of the permit area, which really is  
20 not a question that this Board needs to address, because  
21 we are not arguing that -- petitioners are not arguing  
22 that the haul road -- hauling coal on Highway 89 through  
23 Panguitch requires a permit. We're arguing that the  
24 impacts of that need to be analyzed in meeting the duty  
25 to protect cultural and historic resources. There's

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1 actually quite a bit of dispute -- and we've laid this  
2 out in our briefing -- related to the question of what  
3 haul roads do require a permit. But, in fact, the Board  
4 does not need to engage in trying to parcel that out.

5 That's where the reliance that Alton gave --  
6 they referred you to the 1995 letter addressing what haul  
7 roads need to be permitted. Actually, the exact legal  
8 status of what haul roads need to be permitted is up in  
9 the air, but this Board does not need to address that  
10 because the question is not what needs to be permitted.  
11 We acknowledge that it's not within the permit area. But  
12 the obligation to analyze cultural and historic resources  
13 applies both to the permit area and adjacent areas. And  
14 Panguitch National Historic District falls within the  
15 definition of "adjacent area."

16 So if there aren't any questions on the cultural  
17 resource issue, I would go ahead and move to the air  
18 quality issue.

19 MR. JENSEN: I have a question. And I hear what  
20 you say about your not looking at the issue of Highway 89  
21 and a permitting issue. But the fact that Panguitch  
22 falls within the adjacent area, which is, as I understand  
23 it, is 30 miles away. What would you say if it were on  
24 Highway 89 but the Panguitch Historic District was  
25 100 miles away or 200 miles away or 400 miles away? Does



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1       it matter?

2               MS. BUCCINO: I don't think there's -- as the  
3       language defining "adjacent area" referred to, it talks  
4       about evaluate it in the context. So I think it's  
5       difficult to come up with a fixed geographic scope. I  
6       don't think the fact that it's 30 miles precludes  
7       including it in an adjacent area. I think if it were  
8       200, 250 miles away, clearly the question may become more  
9       difficult.

10              But I think the fundamental fact is that there  
11       are -- I mean, it's hundreds of new trips through this  
12       area. And so the question becomes, could somebody  
13       reasonably expect that that would be an impact of the  
14       mine that's being proposed. I think it is informative to  
15       look at how the issue of access roads has been dealt with  
16       in the context of the National Historic Preservation Act.  
17       And there actually is some federal case law that we cited  
18       in our brief, where the courts have established that you  
19       can't just say, in the context of oil and gas leasing, in  
20       evaluating cultural -- the impacts to cultural resources,  
21       you cannot just look at the leased parcel. The analysis  
22       must incorporate the access roads. Because if the  
23       activity -- oil and gas leasing or the coal mine -- but  
24       for that activity, these impacts, the coal trucks, would  
25       not be going through the national historic district.

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1           MR. JENSEN: Okay. I understand. It just seems  
2 to me that, you know, whether the Panguitch Historic  
3 District was immediately adjacent, I mean touching the  
4 border, or is 30 miles or 100 miles or 300 miles, at some  
5 point it can't be relevant, it would seem to me.

6           MS. BUCCINO: And I guess my response would be,  
7 under the circumstances here, 30 miles is relevant.

8           MR. JENSEN: Thank you.

9           CHAIRMAN JOHNSON: Ms. Buccino, I would  
10 appreciate if you'd give us a little more in-depth  
11 explanation, when you talked about the Division's  
12 technical analysis, including some kind of statement that  
13 the Panguitch Historic District needed to be -- or the  
14 transportation had to be addressed.

15           MS. BUCCINO: Right. It's at page 19 in the  
16 Final Technical Analysis. And the way this issue played  
17 out, according to the records that have -- you know, were  
18 publicly available on the Division's website, the  
19 Division flagged the failure to analyze the Panguitch  
20 National Historic District as a deficiency, yet went  
21 ahead and approved the permit without that analysis.

22           CHAIRMAN JOHNSON: Explain to me what you mean  
23 by "flagged the deficiency."

24           MS. BUCCINO: They specifically identified the  
25 indirect effects from transportation as part of the

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1 analysis that needed to be included in the permit  
2 application, and yet went ahead and approved it without  
3 that.

4 MR. DONALDSON: I can clarify, if you want. Or  
5 we can do that later.

6 CHAIRMAN JOHNSON: No, please do that.

7 MR. DONALDSON: Okay. That part of the  
8 Technical Analysis is referring to the cultural resource  
9 management plan, which had a broader scope than the  
10 permit application. The cultural resource management  
11 plan was looking at also possible federal processes, and  
12 so it had a broader scope than the permit application  
13 process. So in any case, that may have been included in  
14 the technical analysis, but that was related to an  
15 amendment -- amendments that were made to the cultural  
16 resource management plan.

17 And there was no identified deficiency. I think  
18 she may be confusing the deficiency language with one  
19 that occurred related to air quality at one point.

20 MS. BUCCINO: Well, I think the record will  
21 speak for itself. I mean, the cite is to the Final  
22 Technical Analysis at page 19. And it does -- it is  
23 correct that it addresses the cultural management  
24 resource plan that was put forward.

25 Our argument is under the language of the

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1 regulations themselves, that Panguitch National Historic  
2 District is as relevant to the State's duty under its --  
3 the Division's duty under state law, as relevant to that,  
4 as any duty that BLM, the Bureau of Land Management,  
5 would have under federal law.

6 But I think -- what I would argue is it is  
7 inaccurate to represent that a determination was -- well,  
8 what I can say is, nothing in the record that's been made  
9 available publicly today indicates that the Division  
10 actually made a determination that it was not necessary  
11 to include the Panguitch National Historic District.  
12 That is an argument that was first presented in the  
13 briefs now, which is a fair argument to make, but as  
14 we've articulated, it's incorrect. There was -- there  
15 is, under the regulations, a legal duty to include  
16 Panguitch National Historic District because it is part  
17 of what falls within the scope of the meaning of  
18 "adjacent areas."

19 CHAIRMAN JOHNSON: So Ms. Buccino, is your  
20 argument, then, that the Panguitch National Historic  
21 District was not adequately analyzed, it hinges upon your  
22 contention that the adjacent area -- effects on the  
23 adjacent area have to be analyzed, and also that the  
24 technical analysis included a comment about -- and  
25 reading from your response -- in quotes, "Indirect

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1 affects, such as transportation." So those two items are  
2 the basis of your argument?

3 MS. BUCCINO: Fundamentally, the argument is  
4 that the duty to look at cultural resources includes both  
5 the permit area and adjacent areas. The Panguitch  
6 National Historic District is within the term defined  
7 "adjacent areas." And the fact that the Division, in  
8 fact, agreed with it and acknowledged the relevance is  
9 one aspect to support that legal duty that's there.

10 CHAIRMAN JOHNSON: And that's based upon this  
11 statement at 19 in the Technical Analysis?

12 MS. BUCCINO: Yes. That is the statement I'm  
13 referring to in terms of what determination the Division  
14 made or not, yes.

15 CHAIRMAN JOHNSON: Okay. Thank you.

16 MR. PAYNE: What's the date of that Technical  
17 Analysis?

18 MS. BUCCINO: I'm pretty sure it's dated  
19 October 15, the same date at the decision document -- is  
20 the Final Technical Analysis.

21 So if there are no other questions related to  
22 the cultural historic --

23 CHAIRMAN JOHNSON: Are there any other questions  
24 of Ms. Buccino at this time?

25 MS. BUCCINO: Then I'll turn to the air quality

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1 issues.

2 MR. HAROUNY: I have a question for you. It's  
3 in the same line.

4 Are there any other smaller communities that  
5 Highway 89 goes through in this general area?

6 MS. BUCCINO: There's no other national historic  
7 district at issue. There is -- I mean, there is the  
8 community of Alton that's affected, as well. But the --  
9 that is the National Historic District that was flagged.  
10 And the National Park Service also requested -- in  
11 addition, there are numerous comments by residents there  
12 of Panguitch to address the impacts on that community.  
13 I'm not aware of other communities that raise the issue  
14 of the coal haulage going through them.

15 MR. HAROUNY: Is there an equal requirement to  
16 address the impact to either an EA or an EIS on smaller  
17 communities adjacent to?

18 MS. BUCCINO: The scope of what is required  
19 under NEPA -- we have not relied on NEPA as the source of  
20 the duty here. As far as I'm aware, there is not  
21 disagreement that this kind of analysis should be  
22 included within -- analysis done by the National  
23 Environment Impact, the Environmental Impact Statement  
24 that would be done under NEPA.

25 But I would like to clarify, because it was

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1 raised in the briefs, that the reference -- the explicit  
2 reference to reasonable foreseeable transportation routes  
3 within the cultural resource management plan that was  
4 developed, it's been argued that that's only applicable  
5 in the context of looking at the federal leases, because  
6 that document was being prepared to address the  
7 obligation there, as well as here.

8 Looking -- our argument is: Looking at the  
9 clear -- the unambiguous language of the Division's own  
10 permit regulations interpreted in the context of its  
11 statutory duty to protect historic and cultural  
12 resources, that looking at the transportation routes is  
13 encompassed within that state obligation, as well as any  
14 obligation that might flow from NEPA or other federal  
15 law.

16 MR. HAROUNY: I understand that. I was simply  
17 referring to smaller communities and other communities,  
18 and all the mitigating issues that would have to be  
19 addressed if there was an EIS or an EA requirement.  
20 Those issues would have already been addressed by now.

21 MS. BUCCINO: That analysis has not been  
22 completed yet. It's undergoing. And as part of the NEPA  
23 process, there is a determination of the scope of the  
24 geographic area, within which cumulative impacts need to  
25 be addressed.

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1 MR. HAROUNY: And what is that? How large of an  
2 area is that?

3 MS. BUCCINO: As far as I am aware, it hasn't  
4 been determined yet in this context, because it's in the  
5 initial stages. There's no -- been no draft  
6 Environmental Impact Statement issue.

7 MR. HAROUNY: Do you agree as to the assertion  
8 that the scope of -- in a technical review, the scope of  
9 the actual resource management is larger and then brought  
10 down to the permit area. Do you agree with that?

11 MS. BUCCINO: Yes. And I think the Division has  
12 agreed with that, too.

13 MR. HAROUNY: Okay. No others.

14 CHAIRMAN JOHNSON: Okay.

15 Please move ahead.

16 MS. BUCCINO: Yes. Turning to the air quality  
17 issues.

18 Here, I'd like to first clarify that the duty to  
19 address the night skies flows from the obligation, the  
20 requirement in the permit regulations, to have a  
21 sufficient fugitive dust control plan. And we raised  
22 this issue initially in our request for a hearing, and  
23 briefed it more fully in our response in opposition to  
24 the motion to dismiss.

25 Visibility, both at night and during the day, is



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1 clearly impacted by fugitive dust. The problem here is  
2 that the Division deferred analysis of the adequacy of  
3 that fugitive dust control plan to the Division of Air  
4 Quality, acknowledging -- the Division acknowledging,  
5 itself, that it didn't have the expertise to evaluate it.  
6 That may be an appropriate course of action.

7 But the Division's own permit regulations  
8 prohibit it from approving the permit until that analysis  
9 of the adequacy has been done. And here it has not been  
10 done. And so there is a legal obligation that the  
11 Division has to ensure that the permit application  
12 includes an adequate fugitive dust control plan. And it  
13 has not fulfilled that obligation here.

14 CHAIRMAN JOHNSON: Does the Board have any  
15 questions specific to that issue?

16 Please move ahead, then.

17 MS. BUCCINO: Okay. And then finally, the  
18 wildlife issue is very similar in the sense that you saw  
19 the cite to the clear requirement in the permit regs --  
20 it's at R645-301-330 -- that there is a plan included to  
21 protect, among other things, wildlife resources. The  
22 petitioners do not argue that approval by the Division of  
23 Wildlife is necessary. What happened here is that the  
24 Division of Wildlife flagged insufficiencies in the plan  
25 that was submitted. And there is nothing in the record

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1 to indicate that those sufficiencies (sic) were addressed  
2 before the permit application was approved by the  
3 Division. And they related to the monitoring of roadkill  
4 and also to the protection of habitat for sage grouse, in  
5 particular.

6 CHAIRMAN JOHNSON: Any questions on that issue?

7 MS. BUCCINO: So --

8 MR. HAROUNY: Yes. Is any of this area within  
9 the sage grouse study, or endangered areas, or specific  
10 areas of sage grouse study?

11 MS. BUCCINO: I'm sorry. Could you repeat the  
12 question?

13 MR. HAROUNY: Are any of these areas within the  
14 sage grouse study area defined either by BLM or targeted  
15 by BLM or the State?

16 MS. BUCCINO: There has been specific areas of  
17 important sage grouse habitat that is affected by the  
18 proposed mine that was addressed. There -- it was  
19 addressed in the plan that was submitted. And the  
20 question, then, becomes the adequacy of the plan.

21 At the very least, that is a factual question  
22 that does not lend itself to resolution based on a motion  
23 to dismiss, because the requirement for a plan adequate  
24 to protect wildlife is clearly in the Division's permit  
25 regulations.

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1           MR. HAROUNY: And you're saying that it was --  
2           that the issue was not adequately addressed by the  
3           Division?

4           MS. BUCCINO: That's correct. And the argument  
5           is not contingent on explicit approval by the Division of  
6           Wildlife. The Division of Wildlife, here, flagged  
7           insufficiencies that the record does not demonstrate were  
8           addressed. And that is the problem for the Division's  
9           permit approval on the wildlife issue.

10          CHAIRMAN JOHNSON: Mr. Payne.

11          MR. PAYNE: Yeah. There's -- in the Request for  
12          Agency Action, there's two allegations relative to this  
13          wildlife question. And the first is that Division of  
14          Wildlife Resource has not approved the plan, and the  
15          second deals with the adequacy. I heard you deal with  
16          the adequacy. Can you tell us, or can you help me  
17          understand what the basis is for whether approval is  
18          required?

19          MS. BUCCINO: Okay. And just to clarify, that's  
20          not the argument that we made that explicit approval --

21          MR. PAYNE: I'm sorry, I'm reading right here  
22          from the Request for Agency Action where it says, "The  
23          permit application does not contain documentation  
24          established and that the Utah Division of Wildlife  
25          Resources has approved," ACD's Division of Wildlife

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1 Protection Plan. That's an explicit --

2 And this is No. 28 in your Request for Agency  
3 Action.

4 MS. BUCCINO: Go ahead.

5 MR. PAYNE: No, I'm just -- there's two pieces.  
6 One is the approval --

7 MS. BUCCINO: Okay. So that's a factual  
8 assertion that they didn't approve it. All I'm saying is  
9 that we're not making the argument that they're legally  
10 required to do it.

11 So let me step back for a second. We make the  
12 factual assertion that the Division of Wildlife did not  
13 approve the plan. We do not argue that legally the  
14 Division of Wildlife had to. The argument we're making  
15 is that the Division of Wildlife identifies specific  
16 deficiencies. Because they identified those specific  
17 deficiencies, it seems reasonable that they -- that the  
18 Division should require that they be addressed to --  
19 before moving forward to approve the permit. And there's  
20 nothing in the record that shows that they were  
21 addressed.

22 MR. PAYNE: Okay.

23 MS. BUCCINO: So that's simply a factual  
24 assertion that we're making, rather than a --

25 MR. PAYNE: So you are not arguing that approval

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1 is required?

2 MS. BUCCINO: That's correct -- by the Division  
3 of Wildlife.

4 CHAIRMAN JOHNSON: Go ahead.

5 MS. BUCCINO: Just in sum, on those three  
6 issues, cultural, addressing the cultural and historic  
7 resources, addressing air quality, and wildlife, the  
8 petitioners have laid out the legal obligations to do --  
9 to address those three issues. And for those reasons,  
10 granting a motion to dismiss would be unlawful. Thank  
11 you for your consideration.

12 CHAIRMAN JOHNSON: Mr. Donaldson, let's go back  
13 to you for rebuttal. And we'll give everyone an  
14 opportunity. I would just ask the parties to try to  
15 limit any rebuttal to five minutes.

16 MR. DONALDSON: Okay. That's fine. Five  
17 minutes will be sufficient.

18 CHAIRMAN JOHNSON: Thank you.

19 MR. DONALDSON: First of all, with regard to the  
20 cultural resources, the Board is aware that the Division  
21 does not regulate the public highways of the state of  
22 Utah. That authority lies in other agencies of the  
23 state. The Division has no authority over trucks, truck  
24 size, speed limit, or any other aspect related to the  
25 federal highways or to state highways.

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1           Second, it was pointed -- or it was stated  
2 earlier that there was a technical deficiency identified  
3 and related to the Panguitch National Historic District.  
4 That is not true. That is false. In the Cultural  
5 Resource Management Plan, there is some language related  
6 to reasonably foreseeable transportation routes. That  
7 language, the Cultural Resource Management Plan was  
8 prepared as part of a broader process than the state  
9 permit application process. And in terms of -- you've  
10 heard it stated by all of the parties that the Division  
11 did not consider the Panguitch National Historic  
12 District -- the cultural resources within that district  
13 -- to be within the adjacent area for this coal mining  
14 permit; and therefore, they did not analyze them.  
15 There's -- the Division didn't do it. The Board can make  
16 a legal determination that it was required to, but the  
17 Division didn't do it. So it's purely a legal question.  
18 No factual development is required. The Board can make  
19 that determination.

20           Second, I think it's important to point out that  
21 the State Historic Preservation Officer was consulted  
22 with regard to cultural and historic resources and, in  
23 fact, signed off on everything that the Division did with  
24 regard to cultural and historic resources. So that  
25 consultation process has occurred at a state level.

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1           The other thing I wanted to make sure to point  
2 out here is that, it's important in this motion to  
3 dismiss that the Board not focus on any factual -- any  
4 facts that are not alleged within the Request for Agency  
5 Action. The number of trucks that travel through  
6 Panguitch, et cetera, are not -- is not relevant to  
7 whether the Request for Agency Action states a legal  
8 claim -- a valid legal claim. The Board doesn't need  
9 to -- shouldn't be, shouldn't need to look into the  
10 permit, whether the permit includes certain things.  
11 Because the question really is whether the factual  
12 allegations state a legal claim, whether there's relief  
13 that can be granted for the violation that occurred.

14           Take as true that the Division failed to  
15 consider the Panguitch National Historic District. They  
16 did not consider that. Now, the question is whether they  
17 were required to by law. If they weren't, then that  
18 claim should be dismissed.

19           The other thing that needs to be addressed is  
20 whether -- for the determination of whether the Panguitch  
21 Historic District should have been included -- the  
22 definition of "adjacent area" I talked about, or referred  
23 to earlier, discussed whether -- talked about the  
24 context. Now, maybe an archeological site, cave painting  
25 that was located 30 miles from the mining site that --

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1 and the only traffic that ever went out there is coal  
2 mining truck that was going to the mine, you know, in  
3 that context, perhaps, you know, that might be needed to  
4 be analyzed. But in the context -- in this context, the  
5 Panguitch National Historic District where a major state  
6 highway travels -- goes right through the district -- in  
7 that context, it just is unreasonable to expect adverse  
8 impacts from the coal mining operation on those historic  
9 or cultural resources.

10 The comments that were received in the  
11 permitting process -- I don't know how much time I have;  
12 two minutes, okay -- were related to tourism. And the  
13 Division doesn't have -- again, this also relates to the  
14 fact that the Division doesn't have authority to regulate  
15 roads.

16 Now, with regard to air quality, there is no law  
17 requiring analysis of light pollution. And that has been  
18 admitted. The petitioners now try to say that the  
19 fugitive dust control plan is what they were referring to  
20 when they're talking about the clarity of the night sky.  
21 Well, that fugitive dust control plan has been submitted  
22 to the Division of Air Quality. The only requirement is  
23 that that plan comply with state and federal air quality  
24 standards. The Division doesn't make that determination.  
25 That determination is made by the Division of Air



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1       Quality. They will make that determination.

2               Finally, with regard to wildlife, there is a  
3       plan for wildlife protection. There's no question about  
4       that. The Division consulted with the Division of  
5       Wildlife Resources. Division of Wildlife Resources  
6       provided comments. Now they're trying to back away -- or  
7       petitioners are trying to state that they're not arguing  
8       that the Division of Wildlife Resources was required to  
9       approve the plan. Instead, they're saying that the  
10      comments that were addressed must be -- or the comments  
11      that were made must be addressed by the Division. Well,  
12      that just is a de facto approval. That just means that  
13      the Division was required to defer to their  
14      recommendation and to get their approval before it can  
15      approve the permit. So it's nothing more than a little  
16      gymnastic maneuver to say that they weren't required to  
17      approve it. But in reality, they really are stating that  
18      they were required to approve it.

19             Now, just one last thing before I close. I just  
20      in this -- it's a motion to dismiss. And the important  
21      thing is to not get into that these claims shouldn't  
22      require factual development. If you -- if the Board  
23      believes that factual development is necessary, then  
24      these are not proper claims for dismissal. What you need  
25      to do is determine whether -- even based on the factual

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1       allegations made in the complaint -- whether there's a  
2       legal remedy for those claims.

3               Now, just, for example, just assume it's true  
4       that the Division didn't consider the night sky clarity.  
5       Well, they weren't required to; and so therefore, you can  
6       dismiss that claim. And you can go on in all three of  
7       these instances and just assume that the factual  
8       allegation is true.

9               Now, whether something is inadequate or not,  
10       that needs to be supported in the face of the Request for  
11       Agency Action. So they say that the protection plan, the  
12       Wildlife Protection Plan was inadequate. Well, that  
13       needs to be supported by specific, factual allegation.  
14       And they haven't made any specific factual allegation  
15       based on that. That is why we are seeking dismissal.

16               Well, we did find the Technical Analysis,  
17       page 19, if the Board would like a copy of that just to  
18       look at it.

19               MS. BUCCINO: Could you read number -- the  
20       relevant number?

21               MR. ALDER: I guess -- the argument is that it  
22       isn't relevant. You've asked about it, we have it.

23               MR. DONALDSON: Yeah, you've asked about it, we  
24       have it if you want a copy. I don't think it's necessary  
25       in order to determine whether to dismiss the claim, for

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1 the Board to look at it; but you can.

2 CHAIRMAN JOHNSON: I would like to receive a  
3 copy of it, please.

4 MR. DONALDSON: Okay.

5 CHAIRMAN JOHNSON: Mr. Payne, do you have a  
6 question?

7 MR. PAYNE: Yeah. Mr. Donaldson, if I may ask a  
8 question or two. I've heard you say it twice now, that  
9 with regard to approval of the air plan, that that's an  
10 issue for the Department of Air Quality. I'm struggling  
11 with that notion that the Division is going to defer --  
12 it's actually not going to take responsibility, in  
13 essence, for that decision, when it's a requirement of  
14 the regulations that the Division require and approve a  
15 plan. I would look at it as the Division of Oil, Gas,  
16 and Mining is using the Division of Air Quality as an  
17 extension of staff and relying on their expertise. But  
18 ultimately, it's the Division of Oil, Gas, and Mining  
19 that's taking responsibility, is it not, for --

20 MR. DONALDSON: Yes, that's true.

21 MR. PAYNE: -- approving that action?

22 MR. DONALDSON: Yes, that is true.

23 MR. PAYNE: In that case, where is the proper  
24 venue to challenge adequacy of that plan?

25 MR. DONALDSON: Well, I guess in that context,

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1 if the Division is taking the responsibility for the  
2 plan, the particular -- the particulars of the plan,  
3 because we're deferring to the technical expertise of the  
4 Division of Air Quality, those particulars of the plan  
5 would need to be appealed there and then thereafter  
6 appealed here. So.

7 MR. PAYNE: Help me understand how this would be  
8 appealed at Air Quality.

9 MR. DONALDSON: They can feel free to enter  
10 comments at the Division of Air Quality.

11 MR. PAYNE: "Enter comments." But I guess I'm  
12 not understanding how it can be appealed at the Division  
13 of Air Quality.

14 MR. DONALDSON: Oh, they need a permit from Air  
15 Quality.

16 MR. PAYNE: They do? Okay. That's where I need  
17 some help understanding. So subsequent to your issuing a  
18 permit, Air Quality is going to have to issue a permit --

19 MR. DONALDSON: Yes.

20 MR. PAYNE: -- and it's going to contain these,  
21 and maybe other requirements?

22 MR. DONALDSON: Yes.

23 MR. PAYNE: Okay.

24 MS. BUCCINO: And just directly on that point,  
25 though, the problem is, this permit was approved before

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1 Air Quality has evaluated it in any -- the air quality  
2 permit is still pending. So our argument is that that  
3 had to happen, that approval by the Air Quality Division,  
4 of the fugitive dust control plan, had to happen before  
5 this permit could be approved by the Division, and it did  
6 not.

7 MR. PAYNE: Can you tell me where that's in the  
8 statute that there's an order to where -- how those  
9 permits are issued?

10 MS. BUCCINO: Well, the regulations -- the coal  
11 permit regulations, specifying what must be included in  
12 the permit application that the Division considers,  
13 includes the fugitive dust control plan, an adequate  
14 fugitive dust control plan. And that cite is at  
15 R645-301-423.200.

16 MR. JENSEN: And so you take the position that  
17 the issuance of the proposed permit, which provides a  
18 condition that says it is subject to -- that no mining  
19 can take place unless there is an air quality permit  
20 issued, you take that as that's not appropriate. Is that  
21 what you're saying?

22 MS. BUCCINO: Yes. Because to be complete, as  
23 specified by the Division's permit regulations, it must  
24 include an adequate fugitive dust control plan. And this  
25 permit was incomplete in that sense; and therefore, it

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1 was unlawful for the Division of Oil, Gas, and Mining to  
2 approve it.

3 MR. JENSEN: But wouldn't the Division of Air  
4 Quality need to look at the fugitive dust control plan in  
5 deciding that it's going to issue an air quality --

6 MS. BUCCINO: Yes.

7 MR. JENSEN: Okay. And how does it do that,  
8 then? It seems to me that you've got a permit applicant  
9 in a catch-22, because how do you know that you've got an  
10 approved fugitive dust control plan that can go to Air  
11 Quality if the Division hasn't signed off on it?

12 MS. BUCCINO: Well, the requirement -- well, we  
13 would argue the regulations require that the fugitive  
14 dust control plan, if the Division wants to defer to the  
15 expertise and utilize the expertise of the Division of  
16 Air Quality, then the Division of Air Quality must do its  
17 work first. It is a necessary legal prerequisite to this  
18 Division approving the coal permit application.

19 MR. JENSEN: Don't you get to the same place,  
20 though?

21 MS. BUCCINO: What we're looking at is the legal  
22 obligations of the Division under its permit regulations.  
23 In our view, the language requires that the Air  
24 Quality -- that the analysis, that in this case they've  
25 decided to defer to the Division of Air Quality, it must

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1 be done first as a necessary pre -- legal prerequisite  
2 for permit approval. And that did not happen here.

3 So what we would argue is that the Board should  
4 remand -- should, in a sense, remand the permit,  
5 invalidate the permit approval, and ensure that the  
6 action by the Division of Air Quality take place first,  
7 before this Division approves the permit on that issue.

8 CHAIRMAN JOHNSON: Ms. Buccino, I want to be  
9 clear on this. You are saying that your argument is  
10 based upon R645-301-423?

11 MS. BUCCINO: There are a few different places  
12 that the fugitive dust control plan is --

13 CHAIRMAN JOHNSON: This is where you've cited.

14 MS. BUCCINO: Well, there's -- we've provided  
15 all the cites in our brief. The one I just gave you was  
16 one piece of that, 301-423.200. I can list the other  
17 ones right now, if you'd like.

18 CHAIRMAN JOHNSON: 423 says, "The application  
19 will contain an air pollution control plan, which  
20 includes the following," and then there's paragraph 200,  
21 "A plan for fugitive dust control practices as required  
22 under 645-301."

23 Does the permit application include a dust  
24 control plan?

25 MS. BUCCINO: In our view, what is missing --

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1           CHAIRMAN JOHNSON: You are adding the word  
2 "approved" dust control plan. You're saying that this  
3 rule requires that that plan has already been approved.  
4 Is that what you are saying?

5           MS. BUCCINO: What I'm arguing is that it just  
6 can't be one piece of paper that has the title "Fugitive  
7 Dust Control Plan." It needs to be a plan that is  
8 adequate to meet the requirements, as specified there in  
9 the regulations.

10           The Division, itself, has admitted that it has  
11 not made that determination, that it's adequate. It is  
12 explicitly deferring --

13           CHAIRMAN JOHNSON: The Rule requires that the  
14 application will contain an air pollution control plan.  
15 You are not contending that that plan is not in the  
16 application. You are contending that the plan has not  
17 been approved by the Division of Air Quality. Is that  
18 what your argument is?

19           MS. BUCCINO: No. I mean -- no, not exactly.

20           CHAIRMAN JOHNSON: Okay.

21           MS. BUCCINO: We're arguing that it must contain  
22 a fugitive dust control plan that is sufficient to meet  
23 the requirements of the permits -- the Division's  
24 regulations. And it talks about what that plan needs to  
25 include to be adequate. One of the requirements is to



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1       comply with federal and Utah air quality standards. That  
2       determination of adequacy or compliance has not been  
3       made. The Division acknowledges that it is deferring  
4       that determination to the Division of Air Quality.

5               And all we're arguing is that if it is due -- if  
6       it has decided to defer that determination, it can't then  
7       go ahead and approve the permit.

8               CHAIRMAN JOHNSON: And the permit was approved  
9       with the stipulation that no mining activities can occur  
10      until that plan has been approved by the Division of Air  
11      Quality. Is that correct?

12              MS. BUCCINO: We're arguing that that is legally  
13      insufficient under the terms of the regulations.

14              CHAIRMAN JOHNSON: And you are basing that on  
15      your argument on 423 and 423.200 --

16              MS. BUCCINO: Yes.

17              CHAIRMAN JOHNSON: -- is that correct?

18              MS. BUCCINO: Well, there's several pieces. 423  
19      contains several different components. The complete list  
20      of the references to the regulations that we're relying  
21      on is provided in our briefing. I'd be happy to recite  
22      it again here. But I'd prefer to just defer to that  
23      list. That is the --

24              CHAIRMAN JOHNSON: In your paragraph, it talks  
25      about it. It says, "The unambiguous language of the

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1 Division's own regulations." And you don't cite any rule  
2 in that paragraph. So I'm trying to determine exactly  
3 what rule it is that you're talking about.

4 MS. BUCCINO: Okay. So on page 12 of our  
5 opposition brief --

6 CHAIRMAN JOHNSON: Correct.

7 MS. BUCCINO: -- the paragraph there, the first  
8 paragraph lays out the regulatory authority establishing  
9 the -- related to the obligation to submit a fugitive  
10 dust control plan.

11 CHAIRMAN JOHNSON: And the first citation you  
12 have in that paragraph is R645-301-423.200.

13 MS. BUCCINO: Correct, uh-huh.

14 CHAIRMAN JOHNSON: So that is your basis for  
15 your argument that the plan has to be approved prior to  
16 the permit being approved?

17 MS. BUCCINO: Well, then we cite -- well, not  
18 only does 423.200 then cite to two other regulations, but  
19 we cite to several other regulations in that same  
20 paragraph. So that's what we would be relying on in  
21 support of that obligation.

22 CHAIRMAN JOHNSON: Okay. So 423.200 and the two  
23 regulations that it cites?

24 MS. BUCCINO: No.

25 MR. DONALDSON: I think also 423.100. Is that

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1 right?

2 MS. BUCCINO: Well, I can go through and list  
3 them all, right here. But I guess what I'm resisting is  
4 your -- well --

5 CHAIRMAN JOHNSON: I'm trying to understand  
6 exactly where it is that you claim --

7 MS. BUCCINO: Fair enough, yes.

8 CHAIRMAN JOHNSON: -- where in the rules that it  
9 cites that the air pollution plan has to be approved  
10 before the mining permit can be approved.

11 MS. BUCCINO: Okay. So let me take a minute to  
12 step --

13 CHAIRMAN JOHNSON: I know you've made that  
14 argument. And I want to know exactly where it is --

15 MS. BUCCINO: Just let me take a minute to step  
16 through that. Because it starts, yes, with 301-423.200.  
17 And that -- well, actually the beginning of the -- the  
18 whole air quality -- I mean, you really would want to  
19 look at -- the whole section dealing with air quality is  
20 301-420. And then it has several different components  
21 within it. We tried to flag the specific components  
22 within 420 that deal explicitly with the fugitive dust  
23 control plan, and -- just one second here. Okay.

24 So 423 is the piece dealing with the mine of  
25 certain size, which there is no dispute that this mine is

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1 proposed to be 2 million tons. The size threshold here  
2 is 1 million tons per year.

3 And then there are two different pieces to that:  
4 423.100, "An air quality monitoring program to provide  
5 sufficient data to evaluate the effectiveness of the  
6 fugitive dust control practices proposed under  
7 645-301-423.200 to comply with federal and Utah air  
8 quality standards." And then 423.200, "A plan for  
9 fugitive dust control practices as required under," and  
10 then it refers back to 244 -- 301-244. And that is where  
11 the language comes from related to -- so 244.100, "All  
12 exposed surface areas will be protected and stabilized to  
13 effectively control erosion and air pollution attendant  
14 to erosion."

15 CHAIRMAN JOHNSON: Let me try to explain what it  
16 is I'm trying to understand here. It says in 423, "The  
17 application will contain an air pollution control plan."  
18 My understanding is that the petitioner has an air  
19 pollution control plan included in the permit  
20 application, okay.

21 Now, maybe your argument will make a lot more  
22 sense to me if this regulation said, "Will contain an  
23 approved air pollution control plan," because that air  
24 pollution control plan has been submitted and the  
25 Division has referred that plan to the Division of Air

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1     Quality and has issued the mine permit with the  
2     stipulation that no mining activity can occur until this  
3     plan has been approved by the Division of Air Quality.  
4     That would be a lot more clear to me if it said, "The  
5     application will contain an approved air pollution  
6     control plan." I'm trying to understand if there's some  
7     place you can cite for me that specifically says in the  
8     course of action that the Division has taken that it has  
9     to be approved first.

10           MS. BUCCINO: Right. Okay. Well, let me -- I  
11     hear what you're saying. And let me refer you to the  
12     regulations at the very beginning, toward the beginning  
13     of the permit regulations, which deal with the Division's  
14     fundamental obligation in reviewing a permit, which are  
15     the specific written findings for permit application  
16     approval. And this is at R645-300-133. And it says  
17     there that, "No permit application or application for  
18     permit change will be approved unless the application  
19     affirmatively demonstrates and the Division finds, in  
20     writing, on the basis of information set forth in the  
21     application or from information otherwise provided." And  
22     then it goes through to list the specific things, one of  
23     which, and this is 133.100, "The application is complete  
24     and accurate, and the applicant has complied with all the  
25     requirements of the State program."

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1           So our argument is that you can't just submit a  
2 piece of paper that has a title. That there is a duty  
3 that the Division has to ensure the sufficiency, the  
4 adequacy of the fugitive dust control plan, based on  
5 information that has been set forth to it in the permit  
6 application, and as to air quality that has not occurred,  
7 and it needs to legally occur before the Division can  
8 approve this permit. That conditioning it is not legally  
9 sufficient.

10           CHAIRMAN JOHNSON: Okay. I understand what  
11 you're saying.

12           MS. BUCCINO: If I may, there were just a couple  
13 of other points I wanted to add to what Mr. Donaldson had  
14 just said.

15           CHAIRMAN JOHNSON: Okay. Let's go to Mr. Bayer  
16 first, Mr. Bayer and Mr. Bernard. We'll come back to  
17 you.

18           MR. BAYER: Right now, if I could, Mr. Allen has  
19 got some comments on most of this, and then I may have  
20 just a couple points to add. But we won't belabor the  
21 issue.

22           CHAIRMAN JOHNSON: Okay. Thank you.

23           MR. ALLEN: Since we're on the topic now, let's  
24 talk about air quality first, and then I'll have some  
25 comments on the Panguitch Historic District.

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1           Here's what Alton suggests you should rule on  
2           the air quality issue. We suggest that you issue a  
3           ruling that the Division's method of assuring that the  
4           air quality plan was adequate for the purposes of permit  
5           approval, was completely reasonable and not arbitrary and  
6           capricious.

7           As you've learned, the Division chose to defer  
8           detailed analysis of the sufficiency of the dust control  
9           plan to the Division of Air Quality. And they  
10          conditioned operations under the permit on issuance of  
11          the air quality permit. Now Alton takes a bit of a  
12          chance there in accepting their permit from the  
13          Division -- from this Division -- that Air Quality might  
14          go ahead and make some modifications. But I think that  
15          there is simply no merit to the chicken and egg argument  
16          that petitioners are putting before you, that the only  
17          method to assure that the fugitive dust control plan or  
18          the air quality plan is adequate is to require Air  
19          Quality to approve first.

20          I think the Division's approach to this was  
21          reasonable under the circumstances, was not arbitrary and  
22          capricious. And that's what we'd ask you to rule.

23          Turning to the issue of the Panguitch National  
24          Historic District. The reason that this is up in front  
25          of you on a motion for summary judgment is that it is --

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1 as you've been told -- it is purely a question of whether  
2 there was a legal requirement to consider the effects on  
3 the Panguitch Historic District. And I believe, Members  
4 of the Board, that answering that question can be done  
5 entirely by turning to the definitions that have already  
6 been cited here with regard to -- for the Code rules.

7 And one important piece of clarity that we've  
8 gotten out of petitioner's argument is that in  
9 determining whether there is an effect on Panguitch, it's  
10 not about the road, it's about the trucks. The concern  
11 is that the passage of trucks is causing some sort of an  
12 adverse effect, or might cause some sort of an adverse  
13 effect, on the historic district. And you've heard  
14 petitioners tell you that the reason that the historic  
15 district is significant is because it is part of the  
16 adjacent area, as that term "adjacent area" is defined by  
17 this Board's rules.

18 Permit me to read the definition. "Adjacent  
19 area," and we're at R645-100-200. "Adjacent area means  
20 the area outside the permit area where a resource or  
21 resources, determined according to the context in which  
22 the adjacent area is used, are or reasonably could be  
23 expected to be adversely impacted by proposed coal mining  
24 and reclamation operations, including probable impacts  
25 from underground workings."



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1           Here is the reason why the Panguitch National  
2 Historic District is not included. The passage of trucks  
3 hauling coal in interstate commerce after they've left  
4 the mine on a federal highway is not a coal mining and  
5 reclamation operation. There is simply no legal  
6 authority for that proposition, at all. But we're in  
7 luck on this matter, because the Board has also defined  
8 coal mining and reclamation operations. And so we turn  
9 the page over. "Coal mining and reclamation operations"  
10 means --

11           CHAIRMAN JOHNSON: Excuse me, where are you  
12 reading from, Mr. Allen?

13           MR. DONALDSON: We're still in the definition  
14 section R645-100-200.

15           CHAIRMAN JOHNSON: Thank you.

16           MR. DONALDSON: "Activities conducted on the  
17 surface of lands in connection with the surface coal  
18 mine, or subject to the requirements of Section 40-10-18,  
19 surface coal mining and reclamation operations and  
20 surface impacts incident to underground coal mining" --  
21 certainly not that -- "the products of which enter  
22 commerce, or the operations of which directly or  
23 indirectly affect interstate commerce. Such activities  
24 include all activities necessary and incidental to the  
25 reclamation of the operations" -- hauling the coal down

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1 the highway in trucks certainly isn't necessary or  
2 incidental to reclamation -- "excavation for the purpose  
3 of obtaining coal" -- no, we're well past that part of  
4 the process by the time the trucks are rolling through  
5 Panguitch -- "including common methods such as contour,  
6 strip, auger" --

7 (Reporter interruption.)

8 MR. ALLEN: "...including such common methods as  
9 contour, strip, auger, mountaintop removal, box cut, open  
10 pit, and area mining; the use of explosives and  
11 blasting" -- that doesn't involve the trucks rolling  
12 through Panguitch -- "in-situ distillation" -- I'm not  
13 sure I even know what that is, but I don't think it's  
14 happening on Highway 89 or is going to happen --  
15 "retorting, leaching, or other chemical or physical  
16 processing; and the cleaning, concentrating, or other  
17 processing or preparation of coal. Such activities also  
18 include the loading of coal for interstate commerce at or  
19 near the mine site." And then there are a few provisos  
20 that I'll simply represent to you that don't apply.

21 But coal mining and reclamation operations for  
22 the purpose of your authority to regulate ends with the  
23 loading of coal at or near the mine site.

24 MS. BUCCINO: I'm sorry, but I just have to  
25 interrupt, because you stopped --

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1           CHAIRMAN JOHNSON: Excuse me, Ms. Buccino.  
2       Let's let Mr. Allen finish.

3           MS. BUCCINO: All right.

4           MR. ALLEN: I'll take just a minute to read the  
5       rest of that definition to see if there's anything  
6       relevant there. There's reference to haul roads and  
7       access roads, and mine sites typically contain those  
8       things. They're a necessary part of the surface  
9       disturbance of mining, whether it's surface or  
10      underground mining. But there is, I think, no reasonable  
11      reason to treat Highway 89, a four-lane federal highway  
12      rolling through the town of Panguitch, as a haul road or  
13      an access road under the meaning of the regulations.

14           Now, Ms. Buccino is correct that the question of  
15      what roads need to be permitted has been the subject of  
16      considerable and inconclusive litigation. And we cited  
17      one of those cases, the Harmon Mining Case, in our brief.  
18      And the important point out of that case is that when it  
19      comes to haulage, there is a spectrum of activity, from  
20      the immediate haulage from the mine site -- or from the  
21      mine face, I should say, to the other operations that are  
22      occurring on the mine site, itself, to get the coal to  
23      where it can be processed or loaded. In some cases,  
24      mines have to build their own access roads from a public  
25      highway to the mine; and under some cases those have to

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1 be permitted. So there are lots of roads that are  
2 closely associated with mining that the courts usually  
3 hold need to be permitted.

4 And at the other end of the spectrum, according  
5 to the Harmon Mining case, are things like interstate  
6 highways, four-lane federal highways, that are clearly at  
7 the other end of the spectrum and don't require  
8 permitting. And I think the same analysis applies, that  
9 we are so clearly at the other end of the spectrum here,  
10 and so far removed from the mine site, that it simply  
11 makes no sense.

12 I mean, what the petitioner is asking this Board  
13 to do is to extend it's regulatory authority in a  
14 breath-taking way. To suggest that once the coal leaves  
15 the mine, whether by truck or railroad, or whatever, if  
16 it might pass by some sort of facility that might trigger  
17 regulation, this Board should reach out and regulate  
18 that. Please. That's asking you to move the marker  
19 dramatically from wherever it is now. And Alton suggests  
20 you simply don't do it.

21 CHAIRMAN JOHNSON: Thank you, Mr. Allen.

22 Mr. Bayer -- or Mr. Allen, did you have any more  
23 on -- I think you made your point on that matter.

24 MR. ALLEN: Yeah, I don't. I should mention  
25 that Mr. Bernard from Kane County has kindly offered to

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1       cede his five minutes of rebuttal to us, if that's  
2       necessary.

3               CHAIRMAN JOHNSON: I didn't hear Mr. Bernard do  
4       that.

5               MR. BERNARD: I will do that, and am doing that.  
6       Thank you.

7               CHAIRMAN JOHNSON: Go ahead, Mr. Bayer.

8               MR. BAYER: Just a couple quick points. First  
9       off, it is not unusual that in the mining industry that  
10      an issuance of a coal mining permit is one aspect of the  
11      various different types of permits and licenses you have  
12      to obtain. So the mere fact that we're waiting on the  
13      issuance of another permit is not unusual, number one.

14              Secondly, there may be some -- I'm going to say,  
15      misunderstanding as far as what's going on -- is the Utah  
16      regulations require that the application contain a dust  
17      control plan. That's at 423-200, "A plan for fugitive  
18      dust control practices, as required, must be submitted."  
19      Later on, though, it talks about how you do the air  
20      monitoring, okay. And if you look at 425, it says, "All  
21      plans for surface coal mining reclamation activities with  
22      projected production rates of 1 million tons or less will  
23      include an air quality monitoring program, if required by  
24      the Division, to provide sufficient data to judge the  
25      effectiveness of the fugitive dust control plan," so on

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1       and so forth.

2               What we're waiting on from the Division of Air  
3       Quality is, No. 1, their permit that says that our dust  
4       control plan will satisfy their requirements in addition  
5       to the requirements for the dust control plan that we  
6       have to submit to the Division of Oil, Gas, and Mining,  
7       No. 1.

8               And No. 2, there seems to be great emphasis made  
9       about how is the dust control and air quality going to be  
10      monitored. That seems to be a point they're hanging up  
11      on in their memorandum. The air monitoring may not be  
12      done by the Division of Oil, Gas, and Mining, but it may  
13      be done by the Division of Air Quality. And their permit  
14      is specifically going to address the issues of how the  
15      monitoring is going to be done, and how we're going to  
16      maintain quality of the air. That is separate and  
17      distinct from the application of the Division of Oil,  
18      Gas, and Mining. And that's not unusual in the coal  
19      mining industry, that I've got to get a permit from  
20      somebody else before I get to the point where I can  
21      actually mine. If I'm on BLM land, I've got to do this.  
22      If I'm on private land, I've got to do that. And that's  
23      not unusual. So the mere fact, and as the chairman was  
24      very quickly and astutely able to identify, the  
25      requirement is not that I have to have a dust control

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1 plan that has been approved by someone else, it just says  
2 I have to have a dust control plan.

3 Now, the fact that I have an obligation to also  
4 get a permit from the Division of Air Quality -- they  
5 have made their permit contingent upon it -- my permit is  
6 also contingent upon the fact I can't start to mine until  
7 I put a reclamation bond up. That doesn't mean the  
8 permit is any less valid because there's a contingent  
9 provision in there that says I can't mine before I do  
10 something. And I think that the emphasis that the  
11 petitioners are trying to make skews the analysis; and  
12 that is, that we have met the requirements for what we do  
13 with the Division of Oil, Gas, and Mining, but we also  
14 have other requirements.

15 And the fact that the Division may be deferring  
16 to someone else, as far as monitoring the air quality,  
17 and deferring to someone else, as to whether or not -- to  
18 make sure we do comply with the air quality standard, has  
19 nothing to do with the fact that we did submit a dust  
20 control plan. It's in the permit application.

21 CHAIRMAN JOHNSON: Thank you, Mr. Bayer.

22 Mr. Bernard you've ceded your time?

23 MR. BERNARD: I have. I had, sir.

24 CHAIRMAN JOHNSON: Ms. Buccino. I know you have  
25 some things you want --

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1 MS. BUCCINO: Just a few quick points.

2 CHAIRMAN JOHNSON: Thank you.

3 MS. BUCCINO: I would like to start with the  
4 definition of coal mining and reclamation operations,  
5 which is part of R645-100-200. And a key piece that Mr.  
6 Allen did not get to is the inclusion. And I quote here,  
7 "All lands affected by the construction of new roads or  
8 the improvement or use of existing roads to gain access  
9 to the site...." And then it goes on to say, "...site of  
10 those activities, and for haulage and excavation,  
11 workings, impoundments, dams, and ventilation shafts."

12 CHAIRMAN JOHNSON: Can you tell me again where  
13 it is you are reading? You are reading from the  
14 definitions?

15 MS. BUCCINO: Right. It's the definition of  
16 "Coal Mining and Reclamation Operations," found at  
17 R645-100-200. And that specific language is a little bit  
18 further than about halfway down in the text.

19 CHAIRMAN JOHNSON: Okay. And it's -- and that  
20 section is, like, six pages long.

21 MS. BUCCINO: Well, right. So within that  
22 section of definitions, if alphabetically it's listed,  
23 you'll find the term "Coal Mining and Reclamation  
24 Operations," and that's what Mr. Allen was reading from  
25 earlier.



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1           CHAIRMAN JOHNSON: Okay. And your contention --  
2           the part that you added to what Mr. Allen said, would you  
3           please go through that again so I can highlight it?

4           MS. BUCCINO: Right. And my point is that that  
5           definition, even though he didn't read it, does  
6           explicitly include the use of existing roads for haulage.  
7           And I read the exact language, which I'll quote again.  
8           "All lands affected by the construction of new roads or  
9           the improvement or use of existing roads to gain access  
10          to the site of those activities and for haulage."

11          But again, I think the fundamental issue that  
12          I'd like to bring the Board back to is, it is not a  
13          question of what roads must be permitted, but what roads  
14          must be analyzed. And the duty to look and analyze  
15          cultural and historic resources is tied to both the  
16          permit area and adjacent areas. And our argument is that  
17          Panguitch National Historic District is within the  
18          defined term "adjacent areas."

19          Second, I'd just like to clarify, once again,  
20          there have been several references to motions for summary  
21          judgment and to genuine disputes of material fact. As we  
22          indicated, there was an agreement at the beginning that  
23          these three issues, as being considered by the Board,  
24          were going to be done in the context of the Division's  
25          motion to dismiss. And that has a certain standard that

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1 goes with it, which includes accepting all of the factual  
2 allegations made by the petitioners as true, and viewing  
3 the claims in the most -- in the light most favorable to  
4 the petitioners. So the questions that we've -- the  
5 question for the Board to resolve here, now goes to the  
6 legal obligations of the Board. Was there a legal  
7 obligation to analyze the Panguitch National Historic  
8 District? Was there a legal obligation to look at night  
9 skies? And we've argued that there was, and spelled  
10 those requirements.

11 The questions as to the adequacy of the fugitive  
12 dust control plan or the adequacy of the wildlife plan,  
13 those are clearly things that require factual inquiry, so  
14 those claims cannot be dismissed based on motion to  
15 dismiss at this point, unless they, for example, related  
16 to night sky. You determine there was just no legal  
17 obligation to look at that issue at all.

18 And then the final point I would just like to  
19 make goes to the impacts of the coal trucks along the  
20 haul road. And in fact, there are unique and different  
21 impacts that come from the hauling of coal than might  
22 come from other trucks. The coal dust that's generated  
23 is an impact that you wouldn't have from other trucks.  
24 But those issues as to the exact nature of the impacts  
25 really don't go to the question the Board needs to

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1 address right now; which is, you know, under the  
2 regulations can it be clearly determined that dealing  
3 with the Panguitch National Historic District is  
4 completely beyond the scope of what the Division and  
5 Alton needed to address at this point. Thank you.

6 CHAIRMAN JOHNSON: Okay. Does the Board have  
7 any questions?

8 MR. HAROUNY: Just a correction. She mentioned  
9 the legal obligation of the Board. I'm sure you meant  
10 the Division.

11 MS. BUCCINO: The Division, yes. Thank you.

12 CHAIRMAN JOHNSON: Any other questions,  
13 comments?

14 MR. PAYNE: Just real quick. I'm a miner, so  
15 when I read the word "haulage," I, unfortunately, don't  
16 have a definition. Haulage and haul roads typically  
17 refer to the movement of materials on the mine site to a  
18 point of loading to put them into commerce. Would you  
19 have this Board expand the definition of "haulage" and  
20 "haul road" to mean off-mine site in commercial transport  
21 of these materials?

22 MS. BUCCINO: Yes. I mean, it would include  
23 haulage on roads being used for access to the mine. And  
24 in fact, that -- I think the question of what -- I think  
25 you are referring to the -- well, what exactly does

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1 "haulage" mean within the scope of this definition of  
2 coal mining and reclamation operations.

3 MR. PAYNE: Correct.

4 MS. BUCCINO: My argument would be that it  
5 refers to the use of existing roads to gain access to the  
6 site and for haulage. So yes, I would interpret that to  
7 include access roads off the technical mine site.

8 MR. PAYNE: Okay.

9 MR. HAROUNY: Would that --

10 CHAIRMAN JOHNSON: Well --

11 MR. HAROUNY: I'm sorry.

12 CHAIRMAN JOHNSON: Go ahead.

13 MR. HAROUNY: Would that also include, say,  
14 I-15, or some other major freeway that the trucks would  
15 get on.

16 MS. BUCCINO: Well, that question goes exactly  
17 to the very difficult question that the State of Utah and  
18 the Federal Office of Surface Mining have not been able  
19 to definitively resolve, because where do you draw that  
20 line exactly? Our position is that the Board, here, does  
21 not need to resolve that. We are not talking about  
22 whether the road needs to be permitted or not. It's  
23 whether it needs to be -- whether the impacts of the  
24 proposed mine, including the roads, the trucks that are  
25 traveling through Panguitch, need to be analyzed. It is

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1 not a question of whether that road needs to be permitted  
2 and included within the permit area.

3 MR. HAROUNY: Does Highway 89 go right through  
4 the mine?

5 MS. BUCCINO: No, there's -- no. The -- no, it  
6 does not. It goes right through the Panguitch National  
7 Historic District.

8 MR. HAROUNY: So there are other haul roads that  
9 connect to it. And those roads have been part of the  
10 permit application, correct, the haul roads from the  
11 mine?

12 MR. BAYER: Well, if I can interject here, and I  
13 think this goes back to the point that Mr. Payne was  
14 making. The term "haulage" and "haul road" is a term of  
15 art within the mining industry within surface minings,  
16 especially. And it does not deal with the transportation  
17 of coal. It specifically deals -- and if you look at the  
18 context of the definition, and it says, "...those  
19 activities, and for haulage and excavation."

20 Generally what happens is, the haulages where  
21 they will be transporting coal across the surface of a  
22 mining area to, say, either to stockpile it, to take it  
23 to an area that would be used for processing, or  
24 something like that; or haulage might be where they are  
25 hauling dirt or rock on the mine site to stockpile for

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1 later reclamation purposes. "Haulage" does not include  
2 transportation. So if, in fact, I have a mine permitted  
3 area in which I have a haul truck that's going to be  
4 going from this point A to this point B, unless that area  
5 that that haul truck is traveling is permitted, then I am  
6 off permit. The minute my tire gets off permit, if it's  
7 on this haul route, I'm off permit, and I'm subject to a  
8 violation and CO. So haulage is not transportation.

9 And if you read this entire paragraph in the  
10 sentence in context, it says, "Those lands affected by  
11 the construction of new roads, or the improvement or use  
12 of existing roads to gain access to the site for those  
13 activities and for haulage and excavation," so on, and so  
14 forth. So I-70 is not a haul road. 89 is not a haul  
15 road. That area upon the permitted site in which I'm  
16 either hauling dirt, rock, or coal is my haul road. And  
17 that has to be permitted.

18 MR. JENSEN: You know, I appreciate the  
19 discussion and the bantering that's going back and forth.  
20 But isn't the issue relative to the Panguitch National  
21 Historic District, whether or not it's in the adjacent  
22 area? That's what this Board has to decide. If we  
23 decide it's in, then there's an issue. If we decide it's  
24 out, that issue is over, subject to an appeal. I mean,  
25 isn't that -- we're having all this discussion, but I

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1 think that's just noise. I think the issue is whether  
2 we've got it within the adjacent area or not.

3 MR. BAYER: Correct. And that's why the  
4 definition of the "Coal Mining and Reclamation  
5 Operations" is important in that sense, because it is  
6 incorporated within the definition of "adjacent area."  
7 So if it's not part of the coal mine operations or  
8 reclamation, it cannot be part of the adjacent area.

9 MS. BUCCINO: No, that I -- well, I would take a  
10 different position. And I agree, yes, absolutely, the  
11 relevant term is what is within -- is Panguitch within  
12 the adjacent area. And so you turn to that term. And in  
13 my view the key language there is, "reasonably could be  
14 expected to be adversely impacted by proposed coal mining  
15 and reclamation operations." It doesn't require that the  
16 whole road be included within that permitted area. It  
17 just needs to be in an area impacted, "reasonably  
18 expected to be adversely impacted" by the activities, the  
19 coal mining and operation activities. And in fact -- and  
20 that's where I think it is relevant, to look at the final  
21 technical analysis, because you have not only the  
22 National Park Service and the concerned citizens from  
23 Panguitch providing evidence as to the expectation, but  
24 the Division, itself, included the use of Highway 89 as  
25 part of the reasonable -- the reasonably expected

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1 transportation route. And I would argue that is clearly  
2 within the scope of the meaning of "adjacent area."

3 MR. BAYER: And this is where I disagree,  
4 because the fact that the -- the definition of the  
5 adjacent area "to be adversely impacted by proposed coal  
6 mining or reclamation operations" means transportation is  
7 not part of that definition. And the transportation of  
8 coal that comes from a mine has nothing to do with the  
9 definitional standard of coal mining and reclamation  
10 operations. And the definition for "adjacent area" is  
11 dependent upon the definition of "coal mining and  
12 reclamation operations."

13 So yes, if my haul road is going through  
14 Panguitch, then I'm going to be affecting it by my mining  
15 and reclamation operations. But that's not the  
16 circumstance. Once I am completely off permit, and I am  
17 not affecting anything with my mining and reclamation  
18 operations as defined, I'm outside the scope of what is  
19 an adjacent area. Panguitch is well beyond what would  
20 normally be considered. And again, you are looking at  
21 the terms in context of what would be the adjacent area.  
22 And as you've reasonably identified that if we accept the  
23 petitioner's description of what is an adjacent area,  
24 then it becomes wholly arbitrary as far as distance. We  
25 have no idea where it is. Alton has no idea what is the



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1 adjacent area. Does that mean I have to go -- I have to  
2 start from the mine and go all the way through to the end  
3 user of coal -- it gets on a truck or a train -- and  
4 figure out whether or not they are adversely affected.  
5 And if that's the case, then I just included the entire  
6 United States, potentially, in the adjacent area. And I  
7 think that's a burden that you cannot put upon a  
8 permittee, and it's a burden you can't put upon the  
9 Division to try to figure out. But that's the net effect  
10 of what they are asking.

11 CHAIRMAN JOHNSON: Are there any other questions  
12 from the Board? Okay. I believe we're at the point we  
13 should break for lunch.

14 My understanding is that there is still some  
15 negotiations between the parties relative to the  
16 discovery. Is that correct?

17 MR. MORRIS: Really not negotiations --

18 CHAIRMAN JOHNSON: Discussions?

19 MR. MORRIS: -- Mr. Chairman, but we need to  
20 produce a written document.

21 CHAIRMAN JOHNSON: Is there a certain amount of  
22 time that we should allocate for lunch that might help  
23 the parties get this accomplished? I don't want to bring  
24 you back early and then -- if another 10 or 15 minutes  
25 would have made a big difference to you being able to

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1 accomplish this.

2 Are you going to be doing this during lunch?

3 MR. BAYER: That would be my plan to accommodate  
4 the Board. There's no reason for you folks to wait on  
5 us.

6 CHAIRMAN JOHNSON: Okay. Are there any  
7 suggestions how long we should break for?

8 MR. BAYER: Hour and a half.

9 CHAIRMAN JOHNSON: Okay. It's now about 20  
10 minutes to 1:00. Let's reconvene at 2:15.

11 MR. JENSEN: May I ask a question? Is it the  
12 expectation that you are going to reduce your stipulation  
13 to writing in a proposed Order, or that you're going to  
14 have a proposed stipulation and Order which you can read  
15 into the record? I guess either one would suffice.

16 MR. BAYER: Mr. Jensen, I think that we can read  
17 it into the record. I think we're close enough that we  
18 can do it. If that facilitates the Board so that we  
19 don't have to break for a long period of time, I would  
20 suggest that. But I'm not sure if the petitioners are  
21 acceptable to that notion.

22 MR. MORRIS: Assuming we get to something we  
23 agree to read into the record, we're happy with that  
24 procedure. And I think we are. I don't mean to make  
25 this as contingent as it probably sounds. I'm just

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1       trying to be careful.

2               MR. JENSEN:   Seems to me it might expedite --  
3       might be easier to have them agree and read into the  
4       record.   Because now we've got the transcript of both the  
5       stipulation and the proposed Order.

6               MR. ALDER:   Thank you.

7               MR. JENSEN:   Thank you.

8               CHAIRMAN JOHNSON:   Okay.   So let's break for  
9       lunch.   We'll reconvene at 2:15.   That's about an hour  
10      and a half from now.

11              (A break was taken from 12:41 p.m. to 2:23 p.m.)

12              CHAIRMAN JOHNSON:   Let's go back on the record.

13              I'm not sure what items you are talking about,  
14      Mr. Bayer, but let's go back on the record.

15              MR. BAYER:   Clarification of some items.   I  
16      think that this morning when we were talking about that  
17      there were some matters that motions for either  
18      dismissal, or phrased as motions for summary judgment,  
19      were tendered to the Board, were filed for consideration.  
20      And we indicated to the Board this morning that those  
21      were matters that we wanted to pull back away from for  
22      discussion for today.   And you had indicated that that  
23      would be at the discretion of the Board as to what to do  
24      with that.   And I thought we might be able to get on the  
25      record, right now, what the Board's position will be, and

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1 whether or not we are going to be required to address  
2 those issues today, or whether or not the Board will  
3 accept our request to withdraw those issues for  
4 consideration at the time being.

5 CHAIRMAN JOHNSON: You are talking about the --

6 MR. BAYER: -- hydrology issues.

7 CHAIRMAN JOHNSON: -- hydrology?

8 MR. BAYER: Yes, sir.

9 CHAIRMAN JOHNSON: I don't think the Board is  
10 opposed to you withdrawing that for today.

11 MR. JENSEN: As I understand it, you are not  
12 withdrawing the motion, you are just asking that it not  
13 be heard today.

14 MR. BAYER: That's correct.

15 CHAIRMAN JOHNSON: And I think the Board is fine  
16 with that.

17 MR. BAYER: Because those will probably  
18 eventually be a component of a more comprehensive  
19 motion to dismiss.

20 CHAIRMAN JOHNSON: Yes.

21 Is there anyone on the Board that's --

22 MR. GILL: I think that's my understanding.

23 CHAIRMAN JOHNSON: -- that wants to hear that  
24 argument today?

25 We will not be hearing that today, then.

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1           MR. BAYER: Thank you. The second item that I  
2 would like to address, at least initially with the Board,  
3 is, we have come to an agreement upon discovery. And we  
4 will present to the Board what we consider as a  
5 stipulation among the parties. And obviously, it's going  
6 to be within the purview of the Board to make a decision  
7 as to whether or not that will be acceptable to the  
8 Board, obviously. Because I can't dictate to the Board  
9 what it's going to do as far as how it's going to view  
10 discovery.

11           But we think that we'll have resolved many of  
12 the issues that would otherwise be contentious between  
13 the parties over discovery issues, and done with the idea  
14 that we're going to try to expedite everything, narrow  
15 the focus, and move on as quickly as possible.

16           We are going to set amongst ourselves some time  
17 deadlines that we think are attainable and reasonable,  
18 not terribly ambitious. But from the Board's  
19 perspective, we're going to ask that the Board set aside  
20 a day, which would be a -- the March hearing day, the  
21 fourth Wednesday, allow us to be on the agenda for that  
22 day for whatever motions or dispositive matters, or other  
23 matters that may be necessary to bring before the Board.  
24 And we would like to have us tentatively included on that  
25 March docket, at this point in time. I'm not saying that

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1       there are necessarily any issues that might have to come  
2       up, but certainly in anticipation, as we're processing  
3       through everything, that, if possible, I would like to  
4       have the Board consider allowing us to, kind of, reserve  
5       some time on the -- I believe it's the 24th, on that  
6       docket day.

7               Then we're also going to ask that the Board  
8       provide us with a hearing date, a full hearing in April,  
9       perhaps mid-April, that would be a date that would be a  
10      special date, separate from your normal day, so that you  
11      will not -- hopefully that it will expedite matters for  
12      you folks, as well. Our goal is to narrow the issues as  
13      much as possible that will be presented to the Board for  
14      disposition for hearing. We're narrowing the scope of  
15      how many witnesses that we think will be required from  
16      both sides. And we're going to try to present something  
17      to the Board as quickly and as easily and as digestible  
18      as possible.

19             But we think that we might well be served by  
20      having a special hearing day or two set aside in April,  
21      at the Board's pleasure, if that's possible.

22             MR. JENSEN: Again, the purpose of the April  
23      hearing would be for what?

24             MR. BAYER: The April hearing?

25             MR. JENSEN: April date.

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1 MR. BAYER: That would be the formal hearing.

2 MR. MORRIS: The evidentiary hearings.

3 CHAIRMAN JOHNSON: On the Request for Agency  
4 Action.

5 MR. JENSEN: So that is the hearing that you are  
6 asking for, a couple of days separate and apart from our  
7 regularly scheduled --

8 MR. BAYER: Yes, sir, if that would be possible,  
9 Mr. Jensen.

10 CHAIRMAN JOHNSON: And Mr. Bayer, none of the  
11 parties anticipate coming before the Board for anything  
12 in the February hearing?

13 MR. BAYER: Not at the February hearing. We're  
14 going to try to do as much of our discovery and site  
15 inspections and so forth that we can accomplish utilizing  
16 February. To get that accomplished moving into March  
17 with discovery, trying to get all of our discovery issues  
18 completed by about the third week of March. And then  
19 that would allow us that if we need to come to the Board  
20 at that March meeting on any issues, we should, amongst  
21 ourselves, have most everything compressed in a very  
22 workable fashion, so that it should be very limited if  
23 necessary to come to the Board in March. We may not, I  
24 don't know.

25 But we'd like to have our names kind of put on

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1 the docket for March, if need be, and then set aside  
2 maybe a couple of days in April, at the Board's pleasure,  
3 where we could have the formal hearing.

4 MR. MORRIS: Can I speak --

5 CHAIRMAN JOHNSON: Yes, Mr. Morris.

6 MR. MORRIS: -- to this?

7 I agree with everything that Mr. Bayer has said  
8 here, in terms of our understandings and where we would  
9 like to go. But at this point, I want the Board to  
10 understand that, as you will hear later, we have agreed  
11 to do a site visit in February, or perhaps early March.  
12 And we are concerned that conditions will not allow the  
13 completion of all of the work that our expert needs to do  
14 during that site visit. The other side understands our  
15 concern.

16 And what we read you this afternoon will reserve  
17 to the petitioners the right to come back and request a  
18 follow-up visit to do the things that are necessary, if  
19 there are any, once we go out and take a look at the site  
20 and find that all the work that needs to be done -- all  
21 our expert's work that needs to be done can't be done  
22 because of site conditions. And so the agreement that we  
23 have to move toward a hearing in mid-April, while it's  
24 very real, is going to be subject to our opportunity to  
25 come back and explain that we need to conduct a site



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1 visit -- a second site visit to finish up, due to  
2 conditions that simply don't allow our expert to do his  
3 job.

4 CHAIRMAN JOHNSON: And you're talking about snow  
5 cover, I assume?

6 MR. MORRIS: Snow cover is the primary.

7 CHAIRMAN JOHNSON: I don't think that anything  
8 that you've proposed would be objectionable to the Board.  
9 I think the Board will, among itself, will talk about  
10 possible dates for April. There's no guarantee we can  
11 come up with any workable dates.

12 MR. BAYER: We understand.

13 CHAIRMAN JOHNSON: The April hearing is  
14 scheduled for the fourth Wednesday. It's possible that  
15 it could be that time; and we may, if we can't conclude  
16 the hearing on that date, and if we can't come up with  
17 stand-alone dates for full day hearings, we'll need to  
18 come up with something. So give the Board the  
19 opportunity to talk about it and see if there are any  
20 dates we can come up with. If we can, then we'll float  
21 those dates out to you as early as possible -- if we can  
22 come up with those dates.

23 MR. BAYER: And that's why I thought -- from a  
24 housekeeping standpoint -- I thought this would be  
25 something readily addressed at this point in time. .

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1           MR. BERNARD: Could I address one issue to the  
2 Board?

3           CHAIRMAN JOHNSON: Yes, sir.

4           MR. BERNARD: This morning when we started, I  
5 think it was mentioned, at least as to my motion, that I  
6 had not yet read the response that Mr. Morris had kindly  
7 provided. He's now agreed to provide even more,  
8 electronically, to my private email. And the Board said  
9 it would decide whether it was okay to argue that at the  
10 next hearing. I'd like permission to argue it at that  
11 time. I have not yet seen the response -- Mr. Morris'  
12 response.

13           CHAIRMAN JOHNSON: On which motion was that,  
14 Mr. Bernard?

15           MR. BERNARD: It was basically the one that  
16 dealt with the takings and the losing support of Alton's  
17 motion for summary judgment.

18           CHAIRMAN JOHNSON: Okay.

19           MR. JENSEN: And you're suggesting that would be  
20 at the March hearing, since there's not going to be --  
21 you're not going to be before us in February?

22           MR. BERNARD: If it pleases the Board.

23           MR. JENSEN: All right. May I ask the Division:  
24 Are there any matters now that are scheduled for March,  
25 to your knowledge, any other matters?

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1           MR. ALDER: I don't know of anything. We  
2 usually don't know that far ahead.

3           CHAIRMAN JOHNSON: We actually have a request  
4 from SUWA to move a matter from February to March. But  
5 we haven't decided whether we'd agree to that or not.

6           MR. ALDER: I'm sorry. I wasn't aware of that.

7           MR. JENSEN: I would suggest, since we've got  
8 numerous counsel coming from different areas, that this  
9 matter be scheduled first for the Wednesday -- for the  
10 March, and that any other matters then follow -- that  
11 might be filed, follow this matter so that we can  
12 accommodate counsel.

13          MR. ALDER: Thank you.

14          MR. MORRIS: Thank you, sir.

15          MR. BAYER: Thank you.

16          CHAIRMAN JOHNSON: Does that answer your  
17 concern, Mr. Bernard?

18          MR. BERNARD: It does. Thank you, Mr. Chairman.

19          CHAIRMAN JOHNSON: Okay. So Mr. Allen is typing  
20 slower than he thought he would. Is that correct?

21          MR. DONALDSON: I'll call him.

22          CHAIRMAN JOHNSON: Let's take a short break.

23          (A break was taken from 2:33 p.m. to 2:59 p.m.)

24          CHAIRMAN JOHNSON: Let's go back on the record.  
25 Just so the parties are aware, the motion for

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1 partial dismissal, the Board is going to take that under  
2 advisement. And we will get an answer to that as soon as  
3 we can. But we're not going to be able to do that today.

4 So Mr. Allen, are you the operative party here?

5 MR. ALLEN: I fear that I am. There's just been  
6 one tiny issue that's been pointed out to me, that I may  
7 wish to step to the next table and confer.

8 CHAIRMAN JOHNSON: Please do.

9 (A discussion was held off the record.)

10 CHAIRMAN JOHNSON: Okay. So Mr. Allen, you have  
11 a stipulation that the parties have agreed to?

12 MR. ALLEN: Yes. Upon stipulation, the parties  
13 wish to read a joint motion for a discovery order into  
14 the record.

15 CHAIRMAN JOHNSON: Okay.

16 MR. ALLEN: And we would ask the Board to  
17 consider our motion.

18 CHAIRMAN JOHNSON: Yes, please do that.

19 MR. ALLEN: "Stipulation. Parties agree to  
20 jointly move the Board for an order providing for  
21 discovery in this matter on the following terms:

22 "Site inspection. Alton will provide  
23 petitioners with access to all of the permit and adjacent  
24 areas where they have control or right of entry,  
25 effective immediately, on the following terms and

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1 conditions:

2 "1. Participants and purposes of the site visit  
3 for a period of four days are as set forth in  
4 Petitioner's Second Motion for a Site Visit previously  
5 filed with the Board;

6 "2. Petitioners will be accompanied at all  
7 times on site by an escort provided by Alton and by the  
8 Division;

9 "3. The escort will create a digital or  
10 videotape recording of the activities on site at Alton's  
11 expense. The recording is to be made without sound  
12 unless agreed otherwise;

13 "4. All parties agree that access to the site  
14 is entirely at their own risk;

15 "5. Petitioner will provide Alton with a split  
16 of any samples collected during the visit;

17 "6. To facilitate efficient use of time on  
18 site, petitioners' and Alton's experts will meet in  
19 advance, accompanied by counsel, to identify appropriate  
20 times for obtaining the necessary site information;

21 "7. Parties acknowledge that petitioners are  
22 willing to conduct their site visit before snow melt has  
23 occurred, but have reservations that all of their  
24 objectives can be accomplished under available site  
25 conditions. Petitioners therefore expressly reserve the

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1 right to request a follow-up visit, either informally or  
2 through a Board Order for Discovery;

3 "8. The Division will assist in obtaining  
4 access to areas material to the AVF determination;

5 "9. Parties will endeavor to perform the site  
6 visit between February 16 and March 5.

7 New heading, "Production of Documents."

8 "1. Alton and the Division will provide, as  
9 soon as possible but in any event prior to the site  
10 visit, field notes, laboratory reports, and logs of  
11 geological and hydrological investigations by either  
12 party or their consultants for inspection by petitioners.

13 "2. The Division will produce a compact  
14 electronic data disk containing the permit application  
15 and other documents related to the permit approval to be  
16 current as of the date the permit was approved."

17 New heading, "Depositions."

18 "Pursuant to Rule 30(b)(6), the parties will  
19 take depositions as follows:

20 "1. Alton and the Division shall make witnesses  
21 available for deposition upon oral examination during the  
22 period from February 16 through March 5, 2010, upon  
23 topics to be agreed upon by the parties. Scope of  
24 examination to include materials submitted to the  
25 Division, background as necessary, and the review process

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1 by the Division.

2 "2. Petitioners shall make witnesses available  
3 for deposition upon oral examination upon topics to be  
4 agreed by the parties between March 8 and March 19, 2010.  
5 Scope of examination to be basis of contentions by  
6 petitioners and foundations for the request for relief.

7 "Interrogatories are not allowed. Requests for  
8 Admission are not allowed unless otherwise agreed and  
9 ordered by the Board.

10 "Petitioners will serve their hearing witness  
11 list on respondents on or before March 5, 2010.

12 "Respondents will serve their initial hearing  
13 witness list on petitioners on or before February 10,  
14 2010.

15 "Exhibits will be exchanged electronically on or  
16 before April 7, 2010. At that time, parties will  
17 identify all scientific or technical references or  
18 treatises upon which they will rely at hearing."

19 And then the Order we would propose that the  
20 Board enter is as follows:

21 "The Board, upon motion of the parties and for  
22 good cause appearing, hereby enters its order providing  
23 for discovery in this matter upon the terms and  
24 conditions set forth in the parties' oral stipulation.  
25 Respondent Alton will prepare a written order for the

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1 Chairman's signature after enforcement by counsel for  
2 petitioners and the Division."

3 And that is our stipulation and the motion that  
4 we present to the Board.

5 CHAIRMAN JOHNSON: Okay. And all the parties  
6 have agreed to this stipulation?

7 MR. ALDER: We have.

8 MR. MORRIS: Petitioners have agreed.

9 CHAIRMAN JOHNSON: So what's the pleasure of the  
10 Board? Mr. Jensen.

11 MR. JENSEN: I see your proposed order at the  
12 end. But I would like to request that your order recite  
13 all the things that's in your stipulation. And you've  
14 got a reference in the stipulation to something about in  
15 the petitioner's second motion.

16 MR. BAYER: Do you want us to incorporate that?

17 MR. JENSEN: I'd like to see that within the  
18 four corners you can read and know what the order is, if  
19 that would be acceptable with all of you.

20 MR. BAYER: I think we can accommodate the Board  
21 on that easily.

22 CHAIRMAN JOHNSON: Do you want to make that in  
23 the form of a motion?

24 MR. JENSEN: It's in the record, but that is my  
25 motion that the stipulation be reduced in its entirety,



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1 and any references in the stipulation to other pleadings  
2 be incorporated so that the Order, as prepared and  
3 approved by counsel, contains everything, and that you  
4 don't have to look anywhere else. And based on that,  
5 then I would move that the stipulation be approved.

6 CHAIRMAN JOHNSON: Is there a second?

7 MR. QUIGLEY: Second it.

8 CHAIRMAN JOHNSON: Any discussion?

9 All those this favor say aye.

10 BOARD MEMBERS: Aye.

11 CHAIRMAN JOHNSON: Is anyone opposed? Good.

12 MR. BAYER: Thank you very much. We hammered  
13 that one out through quite a lot of deliberations this  
14 morning to try to facilitate it and move this along so  
15 that you folks wouldn't have to put up with any arguments  
16 on discovery.

17 CHAIRMAN JOHNSON: We appreciate the efforts of  
18 all the parties in consolidating things and coming to  
19 agreements.

20 MR. QUIGLEY: Absolutely.

21 CHAIRMAN JOHNSON: Is there anything else we  
22 need to do, then?

23 Before we go off the record, is there anyone  
24 present would who would like to address the Board on any  
25 other matters? Seeing none --

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1           MR. JENSEN: Mr. Chairman, if the Board --  
2 because we're looking at some dates to see if we can  
3 accommodate some dates -- I'm a little bit concerned. If  
4 all the Board can reach a couple of dates, I'm concerned  
5 about Mr. Morris' concern of whether you can get on and  
6 do your site visit or not. Because we're -- between all  
7 the people here on the Board, we're going to go way out  
8 of our way to try and pick a couple of dates in April to  
9 accommodate the hearing. And I'm not saying that we  
10 couldn't change that, but it would be somewhat of an  
11 imposition after we've scheduled the dates, then, to have  
12 to move that because of not being able to get on the  
13 property.

14           MR. MORRIS: We will try to get our expert to  
15 begin the site visit as soon as we get the documents that  
16 we need prior to the site visit. It shouldn't be very  
17 long, in other words, before we can tell the Board and  
18 ACD whether we think there's going to need to be a  
19 subsequent inspection. And our concern is that the Board  
20 not set anything in stone until we at least have that  
21 opportunity and can bring the question of a second site  
22 visit before the Board without things having already been  
23 set in stone. I think we can do that very quickly.

24           MR. GILL: Mr. Chairman.

25           CHAIRMAN JOHNSON: Yes, Mr. Gill.

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1           MR. GILL: Just a follow up to Mr. Jensen, and  
2           that is on the April dates, would it be worthwhile to  
3           sort of put a placeholder on a couple of days in April  
4           for -- just so that we don't fill them up? And I'm  
5           proposing that -- the April hearing is on a Wednesday.  
6           I'm available -- and I think a lot of others are -- on  
7           the adjacent Thursday and Friday.

8           CHAIRMAN JOHNSON: We discussed that a little  
9           bit. We're going to ask the Division to find out, if we  
10          did set aside a Friday, would it be possible for us to  
11          use the building and have the necessary staff people  
12          here.

13          So if you guys could find that out and let us  
14          know, we'd appreciate that.

15          But just the dates that, at this point in time,  
16          seem like they may be agreeable to all Board members  
17          would be those two days after the April hearing. I  
18          believe that would be April 29 and 30. But that's not  
19          firmed up.

20          MR. GILL: Well, I'm just saying as a  
21          placeholder.

22          CHAIRMAN JOHNSON: Yes.

23          MR. GILL: Not as a firm day.

24          CHAIRMAN JOHNSON: Yes, very good.

25          MR. GILL: So is it worthwhile to put something

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1       there, or is your general feeling of the Board members  
2       that that may not work?

3               CHAIRMAN JOHNSON: I think the general feeling  
4       is, as of right now, it looks like those may be  
5       acceptable. And if I understand the plans for the site  
6       visit, by March 5 you will probably know whether or not  
7       you were able to accomplish the site visit and accomplish  
8       all the things that you wanted to do. Is that correct?

9               MR. MORRIS: That's correct. And I would hope,  
10       because that's the end of the window --

11              CHAIRMAN JOHNSON: Right.

12              MR. MORRIS: -- that we could get things  
13       together and let the Board know much earlier than that --  
14       let ACD and all parties know.

15              CHAIRMAN JOHNSON: But March 5, at the outside,  
16       you will know whether or not that site visit was able to  
17       be performed?

18              MR. MORRIS: Yes.

19              CHAIRMAN JOHNSON: Okay.

20              And yes, Mike.

21              MR. JOHNSON: Well, I was just going to say,  
22       before you conclude you might want to just orally  
23       continue this until March, if that sounds like the next  
24       regularly scheduled date the parties will need from the  
25       Board, so it doesn't have to be re-noticed.

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1           CHAIRMAN JOHNSON: Okay. So this matter will be  
2 continued to the March 24, 2010, hearing. And as I said  
3 a little bit earlier, we are taking the motion for  
4 partial dismissal under advisement, and we will have an  
5 answer on that as soon as we can.

6           Is that all we need to do, then? Okay. Thank  
7 you very much. And we stand adjourned.

8           (The proceedings concluded at 3:13 p.m.)  
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